82-49

No. .....

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In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERATED DEPARTMENT STORES, INC. d/b/a I. MAGNIN,
Petitioner

vs.

PHILIP D. CANCELLIER, JOHN W. COSTELLO and ZELMA SMITH RITTER,
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW[1]

I.

The Court of Appeals on the one hand affirmed a judgment for plaintiffs amounting to $2.3 million and interest for age discrimination violative of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634—reportedly the largest award under ADEA thus far and surely the most publicized—and on the other hand held emphatically that the District Court erred in instructing the jury on the standard for ADEA liability by *"completely fail[ing]* to give [the jury] any guidance as to [its] meaning" and departed as well from "strongly preferred" procedure in requiring the jury to decide ADEA and pendent state claims together, i.e. as one, on general forms of verdict. The Court of Appeals also held, however, that the errors committed at trial were harmless, not prejudicial, because there was "ample evidence" that I. Magnin terminated plaintiffs' employment because of age under a proper interpretation of ADEA, because the case "was not decided by a hairsbreadth," and because there was no indication in the record that the jury would have reached a different verdict had the District Court not committed error in its liability instruction.[2]

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1. The caption of the case in this Court contains the names of all parties.

Emphasis in matter quoted here has been supplied.

2. The Court also observed that the liability instruction "was fashioned by the judge from language submitted by I. Magnin." There is naked semantic truth in this because the trial judge rewrote one of several instructions proposed by Magnin to a different end into the only ADEA liability instruction given. The court declined to give further proposed instructions on ADEA liability which Magnin, with the concurrence of plaintiffs' counsel, sought vigorously. It has never been suggested that Magnin waived the error in the instruction the District Court gave; if the Court of Appeals thought the error had been waived, its decision to affirm would have been supported by a firm, traditional ground. *See Beckley Newspapers v. Hanks*, 389 U.S. 81, 82 (1967).

The published opinion of the Court of Appeals, and its soon to be published amended opinion on denial of rehearing, are certain to raise important and troubling questions in age discrimination and other discrimination cases in the future. The questions may be stated thus:

A. Is not the Court of Appeals, in its original opinion and amended opinion on denial of rehearing, seen to have created a new doctrine of harmless error for age discrimination cases? Will not the decision below be understood by lower courts as empowering or obliging them to brush aside error in liability instructions as harmless if the evidence favoring the party in whose favor a verdict has been returned appears "ample," even though that evidence is sharply disputed? And is there not a risk that the anticipated burgeoning of age discrimination litigation in a maturing society will be complicated by the appearance of a special body of law applicable to trial court error in such cases different from the law which governs other civil litigation?

B. Does not the determination of the Court of Appeals that the errors in this case were harmless intrude impermissibly on the right of parties on both sides to a traditional trial by jury? One such right is the right of an aggrieved litigant to a new trial where the verdict against that party is founded upon prejudicial error—a risk assumed by every party demanding a jury trial—and does not the decision of the Court of Appeals here threaten flirtation with new law for age cases alone in which fact finding by a well-instructed jury would be replaced either by a judges' prediction upon the raw trial record of what a well and thoroughly instructed jury might have decided or, more realistically, an appellate finding of fact on liability? *See Pullman-Standard v. Swint*, ... U.S. ...., 50 U.S.L.W. 4425, 29 FEP Cases 1073 (April 27, 1982).

C. Does not the decision of the Court of Appeals on harmless error also threaten to emasculate the Court's recent explanation in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), that defendant's articulation of a legitimate non-discriminatory reason for its action "frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." Does it not combine futility with prejudice to "frame the factual issue" and then compel the jury to decide it without adequate explanation of the standard which is to guide the choice between the factor of age and other alleged causes? And is not the *McDonnell-Douglas* procedure elaborated in *Burdine* itself difficult enough of management in employment jury cases to call upon the Court to warn against a principle of harmless error which may set the ultimate issue at large for decision upon the jury's conception of fairness or reasonableness of the employer's behavior, whether or not motivated by consideration of age?

II.

Intermixed with these questions is the existence in the Circuits of troubling discussion of the semantics of jury instructions to be given on liability in ADEA cases[3]. We submit this itself argues for the attention of the Court. The questions are:

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3. The District Court for the Northern District of California has observed, "The articulation of the controlling standard of proof [under ADEA] has generated a certain amount of semantic confusion," with footnote citations to various statements of the test in the published decisions then available. *Olson v. Southern Pacific Transp. Co.*, 480 F.Supp. 773 (N.D.Cal. 1979), *aff'd*, 654 F.2d 723 (9 Cir. 1981).

The decisions of the Courts of Appeals cited below suggest that the Circuits called upon to decide the question have been troubled over semantic differences in ADEA liability standards approved since 1975. Under ADEA, the semantics of liability and burden of proof often play a larger than usual role for reasons elaborated *infra*, pp. 21-22.

A. Are juries in ADEA cases to be instructed that liability requires a finding by the jury that age was a "determining factor" in the "but for" sense, as the First, Fourth and Seventh Circuits have held, *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1 Cir. 1979),[4] *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4 Cir. 1981), *cert. denied* .... U.S....., 102 S.Ct. 316 (Oct. 5, 1981), and *Kephart v. Institute of Gas Technology*, 630 F.2d 1217 (7 Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); or that "age made a difference," as held by the Sixth, Fifth and Second Circuits, *Laugesen v. Anaconda Co.*, 510 F.2d 307 (6 Cir. 1975), *Haring v. CPC International, Inc.*, 664 F.2d 1234 (5 Cir. 1981) and *Bentley v. Stromberg-Carlson Corp.*, 638 F.2d 9 (2 Cir. 1981); or that juries may be instructed to follow either the "but for" or "age made a difference" tests *"or their equivalent,"* as held by the Court of Appeals in this case, or "some formulation of the determining factor test," as earlier held by the Ninth Circuit in *Kelly v. American Standard, Inc.*, 640 F.2d 974 (9 Cir. 1981)?

B. In view of the inevitable presence of multiple causes for an employee discharge in ADEA jury cases where age discrimination is the basis claimed, is not the existence in the Circuits of semantically different ADEA liability standards, couched as "determining factor," "age made a difference," or "their equivalent," likely to cause inconsistent results among the Circuits in like cases, and is this not

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4. Cited with approval on another point in *Texas Dept. of Community Affairs v. Burdine, supra*, 450 U.S. at 252.

especially so if, as in this case, adjudicated error in jury instructions on ADEA liability is to be disregarded as harmless where the evidence favoring a prevailing party is "ample" even though sharply in dispute on the whole of the record?

C. Is this not a case in which the Court should settle the law by approving a uniform interpretation of ADEA as requiring the determining factor test in the "but for" sense, consistent with the Title VII standard approved in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976), and also reject the Ninth Circuit's "ample evidence" standard for harmless error in age cases by reversing and remanding for a new trial?

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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERATED DEPARTMENT STORES, INC. d/b/a I. MAGNIN,

Petitioner

vs.

PHILIP D. CANCELLIER, JOHN W. COSTELLO and ZELMA SMITH RITTER,

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in Philip D. Cancellier, John W. Costello and Zelma S. Ritter v. Federated Department Stores, Inc., d/b/a I. Magnin, Nos. 81-4154 and 81-4165 below.

OPINIONS BELOW

The opinion of the Court of Appeals filed March 30, 1982, is reported in 672 F.2d 1312, in 1982 Employment Practices Decisions ¶ 32, 639 and in 28 FEP Cases 1151. A copy is printed as Appendix A. The amendment to the opinion on denial of rehearing filed May 27, 1982, is not yet published and is printed as Appendix B. There is no opinion of the District Court.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals rendered its decision and filed its opinion on March 30, 1982. A timely petition for rehearing and rehearing *en banc* was denied on May 27, 1982 (App. C). The Court of Appeals had jurisdiction under 28 U.S.C. §§ 1291 and 1294(1). The District Court had jurisdiction under 29 U.S.C. §§ 626(b) and 626(c)(1) and 28 U.S.C. § 1331(a).

STATUTES INVOLVED

Age Discrimination in Employment Act of 1967, Pub.L. 90-202, 81 Stat. 602, as amended:

Section 4 (29 U.S.C. § 623)

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. ***

Section 7 (29 U.S.C. § 626)

(c)(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: ***

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

Section 12 (29 U.S.C. § 631)

(a) The prohibition in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

STATEMENT OF THE CASE

Plaintiffs Cancellier, Costello and Ritter, then aged 52, 54 and 53, brought this action against Magnin in the District Court in July 1979 on allegations that their employment at the I. Magnin store in San Francisco had been terminated because of age in violation of ADEA. Their complaint also alleged pendent state claims for breach of employment contracts and tortious breach of an employer's implied-in-law covenant to deal fairly.[5] At the time of their terminations, plaintiffs had been employed by Magnin for 25, 17 and 18 years, respectively.

The action was tried to a jury in the District Court over five weeks beginning in December 1981. In January the jury returned on general forms—given them by the District Court over Magnin's objection—verdicts for Cancellier in

5. Plaintiff Costello alleged state claims for fraud and misrepresentation, in addition to claims for breach of contract and the implied covenant. The jury decided these claims in favor of Magnin, and Costello made no complaint about that on appeal.

the amount of $800,000, Costello in the amount of $600,000 and Ritter in the amount of $500,000, a total award of $1.9 million which swelled to a judgment of slightly more than $2.3 million after award of attorneys' fees and costs. Plaintiffs' damage recovery represented an award of from 6 to 8.9 times the maximum back pay lost by each plaintiff calculated by multiplying each plaintiff's monthly salary by the number of months from his or her termination of employment to the time the trial began. The Court of Appeals recognized that the judgment must have included a significant award of punitive damages (672 F.2d at 1318).

Plaintiffs' case was alleged, tried, and argued by their counsel and decided by the jury as one for age discrimination. The state claims for breach of contract and an implied covenant of fair dealing, although legally distinct from the ADEA claim as the Court of Appeals recognized (672 F.2d at 1318 n.6), were founded solely upon evidence related to age, and the allegations of the complaint also were so confined. Plaintiffs' Pretrial Statement framed the issues of fact for trial of their complaint in terms of age discrimination; no issue was asserted suggesting any breach of contract or tortious breach of covenant for reasons other than age. Plaintiffs' counsel argued the breach of covenant claim to the jury with the observation that "we don't need to go over the pretext [on ADEA] again to detail those facts ***;" the contract claim was argued with a brief statement that employment contracts embodied in personnel policies recognizing the benefit to Magnin of long service and experience, taken together with "better than good" performance evaluations of plaintiffs, were "made a mockery" because plaintiffs were terminated out of preference for younger people. There was no evidence even

hinting at any wrong done plaintiffs by Magnin for reasons or upon any basis of contract or breach of covenant apart from age.[6]

The role played by age in the termination of plaintiffs' employment was sharply disputed.[7] Plaintiffs claimed for the evidence that Magnin had adopted an explicit policy of replacing older employees within the age group protected by ADEA with younger people and that plaintiffs were terminated because of this despite good employee performance. Magnin claimed for the evidence that each

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6. We print in Appendix D pertinent extracts from plaintiffs Complaint, Pretrial Statement and Argument to the Jury.

The statement of the Court of Appeals (672 F.2d 1318 n.6) that the state claims "do not depend on age" is correct only in the sense that the claims are distinct from ADEA in legal theory. The opinion as a whole acknowledges that age discrimination was as much the factual basis for the state claims as it was for the claimed violation of ADEA, and the Court's extended discussion was directed to harmonizing plaintiffs' acknowledged recovery of punitive damages on the state claims against the unavailability of such damages under ADEA. The Court's emphatic warning against repetition of the District Court's error in instructing the jury and its submission to the jury of general verdicts was explicitly concerned with trial of future cases where age is the *sine qua non* of complaint under both ADEA and state employment law (672 F.2d at 1317). See text, *infra*, p. 13.

7. The District Court denied plaintiffs' motion for a directed verdict out of hand. Since that time, neither plaintiffs nor the District Court nor the Court of Appeals have ever suggested that plaintiffs were entitled to a directed verdict or otherwise entitled to recover as a matter of law. We discuss the significance of this to the Court of Appeals' determination that the errors at trial were harmless, *infra*, p. 18.

plaintiffs' performance had become unsatisfactory, that age played no causal role in termination of plaintiffs' employment, and that routine reference to plaintiffs' ages in personnel records and notes in evidence signified a determination by Magnin to recognize, and act fairly in light of, plaintiffs' length of service. The parties summarized their own clashing views of the conflicting evidence in their briefs to the Court of Appeals; extracts from the briefs on both sides are printed as Appendix E. The extracts show plaintiffs' own stance, acknowledged by Magnin, that the case was a sharply disputed series of factual issues for the jury.

The District Court rewrote Magnin's proposed instruction No. 21 and gave it as the only instruction to the jury on liability for violation of ADEA. That instruction, interlined and italicized to show deletions and additions, respectively, is as follows:

"DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 21, AS AMENDED

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

In 1967, Congress passed the Age in Discrimination in Employment Act. This Act provides that 'It shall be unlawful for an employer . . . to discharge any individual . . . because of such individual's age *****'

I want to make clear to you exactly what law we are dealing with here. The statute I have just summarized, which is the statute under which plaintiffs bring part of this action, forbids discrimination because of age. It does not, for purposes of this lawsuit, forbid any other type of discrimination, nor does it forbid any other action or inaction by defendant rela-

8. The District Court here inserted plaintiffs' proposed instructions Nos. 34 and 35, printed as Appendix G.

tive to plaintiffs other than discrimination on account of age. It is not unlawful for an employer to discharge an employee for good cause, or to take any action against any employee where the action is based on reasonable factors other than age. Age must be a determining factor in an employer's personnel policies or practices before a violation of the Act occurs. Put another way, the basic principle is that an employer has the right to discharge an employee ~~for good reason, bad reason or no reason at all~~ absent *age* discrimination. Thus, if you should find that age was not a determining factor in plaintiffs' terminations or failure to be reemployed, then you must render a verdict for the defendant on these issues even though you might feel their terminations were unreasonable, arbitrary or unfair."

Magnin also proposed, but the District Court rejected, instruction No. 22, which set out the "age as a determining factor" test in the "but for" sense adopted by the First Circuit in *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1 Cir. 1979), and followed in the Fourth and Seventh Circuits. That instruction amplified the naked references to "determining factor" in proposed instruction No. 21, whose purport was to explain only that a discharge of an employee for a reason disagreeable to the jury did not violate ADEA so long as the discharge was not because of age. No. 21 did not elaborate the "determining factor" test and it was not drafted to do so. Plaintiffs' own proposed instruction No. 36 did set out a "determining factor" test in the "age made a difference" language adopted by the Sixth Circuit in *Laugesen v. Anaconda Co.*, 510 F.2d

307 (6 Cir. 1975) and followed in the Second and Fifth, but the District Court rejected it as well.[9]

Magnin's lead trial counsel objected (App. F) that "the omission of 22, 23, 24, 24A, 24B and 26 take away the heart of the defense. That is to say that the discharge, *the but for factor, is not contained in any of the instructions Your Honor proposes to give.*"[10]

Within minutes after retiring to deliberate, the jury sent this note to the trial judge:

> "The Jury in C 79-1591 RPA requests a review of your interpretation of ADEA."

The District Court then reread to the jury instruction No. 21, quoted above.[11]

The jury returned its verdict of $1.9 million for plaintiffs on general forms, and, after an award of attorneys' fees

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9. Plaintiffs' objection is printed in Appendix F together with plaintiffs' rejected instruction No. 36 and Magnin's rejected instruction No. 22. In time records filed as an exhibit to the Declaration of plaintiffs' lead counsel on their claim for attorneys' fees, these entries of lead counsel are recorded:

> "Telephone call with Ms. McClain and Mr. Lederman regarding *Court's error in excluding Laugesen instruction* regarding standard of causation under the ADEA (extensive conversation)." January 15, 1981.
>
> • • •
>
> Telephone call with Mr. Lederman re circumstances under which supplemental instructions are given to the jury in the course of deliberation; *discussion with Ms. McClain re effects of erroneous ADEA instructions:* review of transcript of jury instructions given January 15, 1981." January 16, 1981.

10. We elaborate *infra*, p. 15. The fact is that Magnin's complaint was not over what its rewritten proposed instruction No. 21 said but what the instructions as a whole did not tell the jury, and *that* is what the Court of Appeals *held* to be error.

11. Plaintiffs' instructions Nos. 34 and 35 (App. G) on the *Burdine* and *McDonnell-Douglas* order of proof and demotion in violation of ADEA also were reread. Neither contained any delineation of the standard for ADEA liability.

slightly in excess of $400,000, the Court entered a judgment for plaintiffs from which Magnin appealed.[12]

The Court of Appeals expedited the appeal and affirmed. Its opinion was amended on denial of rehearing. The Court held that the District Court erred in instruction No. 21 on liability for age discrimination and departed from "strongly preferred" procedure in submitting to the jury general forms of verdict in favor of each plaintiff,[13] but that the errors were harmless and hence required no new trial. In a petition for rehearing and rehearing *en banc* (App. C) Magnin urged that the Court had either ignored or failed for some reason to apply the test for harmless or reversible error laid down in decisions of this Court, e.g., *McCandless v. United States*, 298 U.S. 342 (1936), and *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76 (1919), as well as *Kotteakos v. United States*, 328 U.S. 750 (1946), and decisions of the Ninth Circuit itself in *Almaraz v. Universal Marine Corp.*, 472 F.2d 123 (9 Cir. 1972), *Northern P. Railway v. Herman*, 478 F.2d 1167 (9 Cir. 1973), and *Pollock v. Koehring Co.*, 540 F.2d 425 (9 Cir. 1976). Magnin also called attention to the only authorities cited for the holding that the error in jury instructions was harmless, F.R.Civ.P., Rule 61, *Ginsburg v. Ginsburg*, 276 F.2d 94 (9 Cir. 1960), and 7 Moore's Federal Practice ¶ 61.11 (2d ed. 1979), as having to do only with harmless error in drafting a notice of appeal and other harmless error in matters Moore characterizes as involving "niceties of form." The Court of Appeals denied rehearing

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12. Plaintiffs appealed from the portion of the judgment refusing them reinstatement and an injunction, which the Court of Appeals affirmed.

13. The District Court sent to the jury separate forms of verdict in favor of Magnin proposed by it. The jury returned two of these only in Magnin's favor on Costello's claims of fraud and misrepresentation.

with an amendment to its opinion which cited *McCandless* and *Fillippon, inter alia,* but reiterated adherence to *Ginsburg* and Moore as the authorities for its holding of harmless error. These citations were coupled with the Court's observations that the evidence in favor of plaintiffs was "ample," that the case "was not decided by a hairbreadth," that the Court found no indication in the record that a properly instructed jury would have decided differently, and, as already stated, that "the challenged instruction was fashioned by the judge from language submitted by Magnin." We discuss the treatment of the case by the Court of Appeals in greater detail in our elaboration of the reasons for granting the writ, to which we now turn.

REASONS FOR GRANTING THE WRIT

I. The Decision and Opinion of the Court of Appeals Will Be Interpreted as Injecting a New Doctrine of Harmless Error Into Age Discrimination Cases Which Is Contrary to Settled Law Governing Other Civil Litigation.

A. This Is An Important Case With Nationwide Impact.

The award here of $2.3 million with interest to three individual plaintiffs in their 50's has been widely reported as the largest damage award for age discrimination under ADEA thus far. We know of no larger.[14] It will surely be looked to by Bench and Bar in future cases.

The United States work force includes 40 or more million people between the ages of 40 and 70,[15] the age group protected by ADEA, 29 U.S.C. § 631(a). It is common knowl-

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14. The case has received nationwide publicity on two occasions on a Sunday evening network television news program, CBS' 60 Minutes, which is said to enjoy the largest audience ratings for programs of its kind.

15. United States Department of Commerce, Bureau of the Census, 1981 Statistical Abstract of the United States (102d Ed.), p. 383.

edge that ours is a society of advancing age in which the number of ADEA cases can be expected to burgeon if not explode. It is also fair to say that federal age litigation is a new field even for the experienced in employment cases. Age cases, we believe, are seen to have a certain turbulence as the law begins to develop, not unlike that seen in Title VII cases a decade ago. Analogy to Title VII decisions is complicated by the right to jury trial in age cases and the even more striking consequences of the fact, as the Court of Appeals wrote, that age is an attribute which "comes to each of us in time" and hence "will inevitably be present in a multitude of employee discharges" (672 F.2d at 1316).

The opinion of the Court of Appeals recognizes this, and warns against repetition in future cases of what the District Court did at trial of this action in language more emphatic than that often used in reversing and remanding for a new trial. If the Court had reversed in this case, one might conclude that the Ninth Circuit had cast itself into the mainstream of developing ADEA law. But the Court of Appeals instead held the jury instructions and verdict forms so emphatically disapproved for other cases to have been harmless error in this case. Its ultimate decision will be seen widely, we submit, as creating a doctrine of harmless error for age cases which is at once remarkable, surprising and contrary to law thought to be settled.

B. The Opinion of the Court of Appeals on District Court Error in the ADEA Jury Instruction and Departure from Strongly Preferred Procedure on Form of the Jury Verdicts.

Because the Court of Appeals spoke carefully and plainly in its opinion—a fact which itself portends the anticipated impact of the case—we quote the opinion despite limited space in preference to characterizing it.

On error in instructing the jury on ADEA liability (672 F.2d at 1316):

> "The essence of a proper jury instruction under *Kelly* [*Kelly v. American Standard, Inc.*, 640 F.2d 974 (9 Cir. 1981)] is that it require the jury to focus on *the marginal effect of the age factor.* Age need not be the sole factor in a discharge or other discriminatory practice. Conversely, it is not enough that age discrimination be present or even that it figure in the decision to fire; age must 'make a difference' between termination and retention of the employee in the sense that, but for the presence of age discrimination, the employee would not have been discharged.
>
> "Here the district judge instructed the jury that '[a]ge must be a determining factor in an employer's personnel policies or practices before violation of the Act occurs.' *The district judge completely failed to give any guidance as to the meaning of 'determining factor' in lawsuits under the ADEA,* or to refer to the *Laugesen* and *Loeb* test we adopted in *Kelly v. American Standard, Inc. This was error.* The words 'determining factor' are not self-explanatory. In general, fair application of the Act requires the trial judge to formulate precisely what employer conduct the ADEA redresses and what employer conduct it leaves undisturbed. Because the attribute with which the statute is concerned comes to each of us in time, it will inevitably be present in a multitude of employee discharges. It will be a factor in many and a determining factor in some. It is only this last group that can obtain relief under the ADEA, even though, in the broad sense, it aims to benefit the entire aged employment force."

On departure from "*strongly preferred*" procedure in use of a general verdict (*Id.* at 1316-1317):

> "I. Magnin contends that the district court committed reversible error by using simple general verdict forms

without requiring special interrogatories or any breakdown of the verdict by source of damages. Thus, I. Magnin contends, the possibility of punitive damages not recoverable under the ADEA in this lawsuit or of duplicative damages in the pendent state claims requires a new trial."

• • •

"When state claims for breach of the implied covenant of good faith and fair dealing are joined to claims of age discrimination under the ADEA, however, review of jury verdicts presents special difficulty to appellate courts. A general verdict may conceal punitive damages which may not be allowed under the ADEA. If the state claims are flawed, the entire verdict may have to be reversed. For these reasons, a separate verdict for each claim and a separate verdict on punitive damages is strongly preferred."

In suggesting that repetition of what occurred here in future cases "may conceal punitive damages which may not be allowed under the ADEA" and "if the state claims are flawed, the entire verdict may have to be reversed," the Court was not suggesting that it had found a nonfederal basis for the judgment. It was warning that state and ADEA claims inevitably will be mixed together in future age discrimination cases where plaintiffs are tempted by the prospect of punitive damages, and that errors of the sort committed here can be counted upon to present "special difficulty to appellate courts" (*Ibid.*). See note 6, *supra*.

C. The Decision of the Court of Appeals that the Error Committed by the District Court was Nevertheless Harmless.

With respect to the jury instruction on liability (*Id.* at 1316):[16]

"However, a careful reading of the transcript and

16. The quotation is from the published opinion. It was amplified by amendment on denial of rehearing, printed as Appendix B.

record convinces us that in this case the instruction does not require reversal. Giving it was harmless error. There is little or no indication in the proceedings that the outcome would have changed if the *Kelly* jury instruction had been given. This case was not decided by a hairsbreadth. There was ample evidence that consideration of age 'made a difference' in the termination of Cancellier, Costello, and Ritter. Moreover, it was conceded at oral argument that the challenged instruction was fashioned by the judge from language submitted by I. Magnin. While we are extremely reluctant to affirm verdicts based on jury instructions different from those approved in *Kelly* or their equivalent, we find that on the facts of this case refusing a new trial is consistent with substantial justice. Fed.R.Civ.P. 61; *Ginsburg v. Ginsburg*, 276 F.2d 94, 96 n.2 (9th Cir. 1960); 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 61.11 & n.1a (2d ed. 1979). The instruction approved in *Kelly* adequately protects against mistaken inferences either that age must be the sole factor in the discharge, *or that age may be less than a 'but for' cause of the discharge.* It is strongly preferred. Here, however, we find the error harmless."

And on the use of general verdicts, which required the jury to determine ADEA and state claims on the one hand and compensatory and punitive damage claims on the other without specification or differentiation (*Id.* at 1317):

"Submission of special interrogatories is a matter committed to the discretion of the district judge. Fed. R.Civ.P. 49(b); *Monsma v. Central Mutual Insurance Co.*, 392 F.2d 49 (9th Cir. 1968); 5A J. Moore & J.

Lucas, *Moore's Federal Practice* ¶ 49.04 & n.3 (2d ed. 1981). A jury generally is not required to itemize the components that enter into an award of damages (citations omitted)."

• • •

"Nevertheless, failure to submit special interrogatories was not an abuse of discretion. *See supra* p. 1317. The amounts awarded here are consistent with a reasonable award on the ADEA and pendent state claims. We find no reversible error****"

D. The Court of Appeals First Ignored and Later Explicitly Misapplied the Settled Standard for Determining the Harmless or Prejudicial Nature of the Error.

The opinion of the Court of Appeals, before it was amended on denial of rehearing, found the error at trial to be harmless without applying or articulating *any* standard. It said simply that the "case was not decided by a hairsbreadtn" and there "was ample evidence that consideration of age 'made a difference' in the termination Cancellier, Costello and Ritter." It also said that "the challenged instruction" was fashioned from Magnin's proposed instruction No. 21, but, as we have seen, the issue has always been the error of the District Court in failing to give the jury any hint as to the meaning or content of the "determining factor" test and it has never been suggested or held that the error was waived.

As early as 1936, this Court described as "well settled" the two-pronged rule (1) that errors in civil trials "which relate to the substantial rights of a party" are presumed prejudicial, and (2) substantive error requires reversal unless it affirmatively appears from the whole record that the error was harmless. *McCandless v. United States*, 298 U.S. 342, 347-48 (1936); *accord: United States v. River*

Rouge Improv. Co., 269 U.S. 411, 421 (1926); *Kotteakos v. United States*, 328 U.S. 750, 763-765 (1946); and especially *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919). Magnin's petition for rehearing (App. C) called attention to the failure of the opinion of the Court of Appeals to even mention this settled law. On denial of rehearing (App. B) the Court amended the opinion to include citations to *Fillippon* and *McCandless* and a statement that "it affirmatively appears from the record that the instruction did not prejudice defendant." But in the amended opinion the *sole basis* for this conclusion continues to be that this "case was not decided by a hairsbreadth" and that there was "ample evidence that consideration of age 'made a difference.'"[17] Further, the Court seems to have undertaken to distinguish *Fillippon* and *McCandless*, while at the same time articulating the rule for which they stand, by creating a new category of harmless error. Thus the court said this case, where the harmlessness of the error rests on "ample" yet disputed evidence, is to be treated differently than cases in which an erroneous instruction affirmatively misstated the law "or forbade the jury to consider what it properly should have considered." Here, the Court said by amendment, the erroneous instruction "was merely an unelaborated version of the correct standard," a statement which stands in sharp contrast with the Court's earlier observation that the ADEA liability instruction given below "*completely failed* to give any guidance as to the meaning of 'determining factor' in lawsuits under the ADEA."

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17. The amendment added two additional citations, *Van Domelen v. Westinghouse Electric Corp.*, 382 F.2d 385, 387 (9 Cir. 1967), and *Tss Sportswear Ltd. v. Swank Shop (Guam), Inc.*, 380 F.2d 512, 522, 523 (9 Cir. 1967). The decisions are described parenthetically as involving "ample evidence of forbearance" and

Prior decisions of this Court and the Courts of Appeals have placed harmless error in civil jury instructions in five categories. The "ample" yet disputed evidence category articulated by the Court of Appeals here is alien to all of them. First, there are the cases where the jury instructions as a whole set out the law correctly, i.e., the instructions are correct when properly interpreted, *e.g., Haring v. CPC International, Inc.*, 664 F.2d 1234 (5 Cir. 1981); *Troutman v. Southern R. Co.*, 441 F.2d 586, 590-591 (5 Cir. 1971), *cert. denied*, 404 U.S. 871 (1971); *Bass v. International Brotherhood of Boilermakers*, 630 F.2d 1058, 1065 (5 Cir. 1980); *In Re Air Crash Disaster, Etc.*, 635 F.2d 67, 77 (2 Cir. 1980). Second, errors in jury instructions are harmless if they are effectively cured before the case is sent to the jury, *e.g., Baker v. Elcona Homes Corp.*, 588 F.2d 551, 560 (6 Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *Rivers v. Angf. A/B Tirfing*, 450 F.2d 12, 15 (5 Cir. 1971); *Mercer v. Theriot*, 377 U.S. 152, 154-55 (1964), *reh. denied*, 377 U.S. 973 (1964). Third, error in instructions affirmatively appear harmless if the verdict against appellant was rendered pursuant to instructions that misstated or miscast the law in favor of the appellant,[18] *e.g., Fury Imports, Inc. v. Shakespeare Co.*, 625 F.2d 585, 589 n.2 (5 Cir. 1980), *cert. denied*,

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"overwhelming support in record for result below." *Van Domelen* affirmed a judgment fully sustained by a ground free from error and as to which harmless error was committed respecting an alternate ground. *Tss Sportswear* affirmed a judgment in a nonjury case on the ground that the trial judge committed only harmless error in refusing reexamination and limiting examination of witnesses, matters within the discretion of the trial court. We think it not unfair to say that the inaptness of these decisions, taken together with the misapplication of *Fillippon* and *McCandless* on the face of the amended opinion, will enhance the risks we discuss here for future jury trials of age cases as a result of the Court of Appeals' decision.

18. The Court of Appeals itself plainly recognized that the error in the instructions it found here did not favor Magnin.

450 U.S. 921 (1981); *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334, 350 (1 Cir. 1980), *cert. dismissed*, 449 U.S. 1135 (1981); and *Hydrolevel Corp v. American Soc. of Mechanical Engineers, Inc.*, 635 F.2d 118, 125-127 (2 Cir. 1980), *aff'd.*, ... U.S. ...., 102 S.Ct. 1935 (May 17, 1982). Fourth, an erroneous instruction is harmless where the verdict of the jury demonstrated an independent ground unaffected by the error which precluded recovery or defense on the ground to which the error related, *e.g., Stoddard v. School Dist.*, 590 F.2d 829, 834 (10 Cir. 1979); *Moczygemba v. Danos & Curole Marine Contractors*, 561 F.2d 1149, 1152 (5 Cir. 1977); *Smith v. Illinois C.R. Co.*, 486 F.2d 943, 946 (5 Cir. 1973), *cert. denied*, 416 U.S. 985 (1974); *Harris v. Quinones*, 507 F.2d 533, 538-39 (10th Cir. 1974); and *Horne v. Georgia S. & F. R. Co.*, 421 F.2d 975, 979-980 (5 Cir. 1970). Fifth, error in an instruction is harmless if the prevailing party was entitled as a matter of law to a directed verdict against the complaining party, *e.g., Charleston Nat. Bank v. Hennessey*, 404 F.2d 539, 543-44 (5 Cir. 1968); *Prebble v. Brodrick*, 535 F.2d 605, 613 (10 Cir. 1976); *Maryland Casualty Co. v. Dondlinger & Sons Constr. Co.*, 420 F.2d 1368, 1371-72 (8 Cir. 1970); *Vecchio v. Anheuser-Busch, Inc.*, 328 F.2d 714, 719 (2 Cir. 1964), *cert. denied*, 379 U.S. 831 (1964); and *Lieberman v. Gulf Oil Corp.*, 331 F.2d 160, 162 (2 Cir. 1964). In cases where the court has reversed and remanded as against a contention by an appellee that the adjudicated error was nevertheless harmless because the evidence supporting the judgment appealed from was ample or overwhelming, that claim has been uniformly and consistently rejected, *e.g., Clayton v. Burston*, 493 F.2d 429, 432 (5 Cir. 1974); *McGinnis Piano & Organ Co. v. Yamaha International Corp.*, 480 F.2d 474, 480-81 (8 Cir. 1973); *see also Gardner v. Wilkinson*, 643 F.2d 1135, 1137 (5 Cir. 1981)

(reversed for new trial despite substantial evidence in support of verdict); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1372 (5 Cir. 1981) (reversed on basis of single erroneous instruction despite sufficient evidence to support verdict); the Second Circuit rejected an "ample evidence" contention under ADEA in *Bentley v. Stromberg-Carlson, supra.*

Until this case, the traditional test for harmless error has been applied uniformly in age litigation under ADEA. *Haring v. CPC International, Inc., supra,* (error cured); *Geller v. Markham,* 635 F.2d 1027 (2 Cir. 1980), *cert. denied* 451 U.S. 945 (1981) (error cured); *Smith v. University of North Carolina,* 632 F.2d 316, 337 (4 Cir. 1980) (error favorable to appellant); *Loeb v. Textron, Inc., supra* (reversed despite strong evidence supporting verdict); *Laugesen v. Anaconda Co., supra* (reversed against claim that ample evidence supported verdict); and *Bentley v. Stromberg-Carlson Corp., supra* (reversed against claim that appellee was entitled to directed verdict).

The temptation—resisted successfully by other courts in ADEA cases—to forego the rigors of a new trial through an appellate finding of fact on liability, *cf. Pullman-Standard v. Swint,* ..... U.S. ....., 50 U.S.L.W. 4425, 29 FEP Cases 1073 (April 27, 1982), is natural, well understood and the subject of serious scholarship. See Traynor, *The Riddle of Harmless Error* (Ohio Univ. Press 1970), pp. 20-22.[19] We submit that observance of the separate provinces of court and jury is so fundamental to the jury system as to be organic. It inevitably includes the right of every litigant

19. "The concept of fairness extends to reconsideration of the merits when a judgment has been or might have been influenced by error. In that event there should be a retrial in the trial court, time-consuming or costly though it may be. The short-cut alternative of reconsidering the merits in the appellate court, because it is familiar with the evidence and aware of the error, has the appeal

to a new trial where the jury verdict against that party is founded on substantive error.[20]

E. Erroneous Recognition of Harmless Error Poses a Special Threat to Effective Management of McDonnell-Douglas Procedure in Federal Age Discrimination Cases.

Although this Court has yet to decide explicitly that the procedure approved in *McDonnell-Douglas Corp v. Green*, 411 U.S. 792 (1973) governs ADEA cases, the Circuits which have been confronted with the question are unani-

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of saving time and money. Unfortunately it does not measure up to accepted standards of fairness."

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"There is a superficial appeal to the argument that if a new trial without error would clearly have the same result, justice would be delayed and judicial resources wasted by requiring it. Such an argument, however, assumes that the evidence would be the same, that counsel's tactics and the trial judge's rulings, aside from the error, would be the same, and that the reactions of the trial judge or jury would be the same as those of the previous judge or jury. Even in a context of these assumptions, the question does not qualify as a test of harmless error. The crucial question is not what might happen tomorrow on an edited rerun, but what did happen yesterday on the actual run."

• • •

"• • • the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result. Overwhelming evidence may provide support, even conclusive support, for holding the error harmless, but it is not invariably conclusive. If the error was so forceful as to leave its mark on the judgment, the trial itself was contaminated. An appellant whose right to a fair trial in a trial court has been vitiated should be accorded that right anew. Retrial is a small price to pay for insuring the right to a fair trial."

20. Again, one need look no further than the opinion of the Court of Appeals itself to establish that the error in this case was substantive and not merely, as Moore has said in another connection, affected with "niceties of form."

Professional readers of the decision of the Court of Appeals with responsibilities in future cases will discover from the briefs that the harmless error holding here was against the undisputed facts of record that (1) within minutes after retiring the jury requested further instruction on the trial judge's "interpretation of ADEA," following which the erroneously inadequate instruction was reread, (2) plaintiffs joined Magnin in requesting an adequate liability instruction at the outset and (3) plaintiffs' counsel placed of record on their application for attorneys' fees their own discussion of counsel's concern about error in the instructions.

mous in holding that it does. *Loeb v. Textron, Inc., supra* at 1014-16[21]; *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 920 (2 Cir. 1981); *Rodriguez v. Taylor*, 569 F.2d 1231, 1239 (3 Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Smith v. University of North Carolina, supra* at 332-333 (4 Cir. 1980); *Williams v. General Motors Corp.*, 656 F.2d 120, 127-128 (5 Cir. 1981), *cert. denied*, ... U.S. ....., 102 S.Ct. 1439 (Feb. 22, 1982); *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 959-60 (8 Cir. 1978); *Douglas v. Anderson*, 656 F.2d 528, 532 (9 Cir. 1981); *Schwager v. Sun Oil Co.*, 591 F.2d 58, 60-61, (10 Cir. 1979); *cf. Laugesen v. Anaconda Co., supra* at 312.

Difficulties with *McDonnell-Douglas* are well-known. Recently this Court, in *Burdine*, reversed a judgment of the Fifth Circuit and held that the defendant's burden in meeting plaintiff's *prima facie* case is merely to articulate, not prove, a legitimate nondiscriminatory reason for adverse employment action. *McDonnell-Douglas* problems are especially critical in jury cases. The Courts of Appeals are not in agreement over what the jury is to be told about the shifting burden of going forward with evidence and the burden of ultimate persuasion in such cases. *Loeb v. Textron, Inc., supra* at 1016-17; *Laugesen v. Anaconda Co., supra* at 312; and *Spagnuolo v. Whirlpool Corp., supra* at 1113 n.2. Even more to the point, when the shifting burden of going forward with evidence results in a framing of the ultimate issue on which *Burdine* requires the plaintiff to sustain the burden of persuasion, a jury is helpless to decide the issue unless the court has provided a clear and intelligible standard, and the jury's helplessness for lack of a standard may become especially critical to the result where, as here, plaintiffs' *prima facie* case, defendant's explana-

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21. The decision of the First Circuit in *Loeb v. Textron, supra*, on *McDonnell-Douglas* is cited with approval in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

tion and plaintiffs' claim of pretext all clamor for the jury's consideration. We go so far as to say that *McDonnell-Douglas* has no chance to function in a jury case unless the jury is armed with a clearly stated liability standard adequately explained.

In this case the Court of Appeals brushed aside as harmless error a defect in the jury instructions on liability which, according to the Court of Appeals' emphatic language in both its original and amended opinion, deprived the jury of any information about the standard the jury was to apply in deciding whether plaintiffs had proved their cases by sustaining the burden which was always theirs under *Burdine*. Is it not obvious that the procedure of *McDonnell-Douglas* clarified in *Burdine* reaches its summit when the jury undertakes to test the plaintiff's entire case by application of a standard for ADEA liability given it by the court? Is it not equally plain that the appellate decision in this case will be understood to mean that if the jury is deprived at that critical moment of any standard at all to apply, the failure of the trial judge to provide a meaningful standard may nonetheless be only harmless error?

We do not hesitate to say that there is much in the decision and opinion of the Court of Appeals which will work profound evil and confusion in future jury trials of age discrimination and other cases sought to be tried under *McDonnell-Douglas*. For if error in the charge of the trial court, either through misinstruction or "completely" indequate instruction, may permissibly be brushed aside on the authority of the Court of Appeals in this case, the Courts of Appeals themselves and perhaps this Court inevitably will be faced with a recurring yet unnecessary issue. And this is especially so if the decision of the Court of Appeals is read, as it must be, as making the harmless or prejudicial character of such error turn upon an appellate determination that the evidence supporting

the judgment was "ample" even though sharply disputed at the trial.

II. This Court Should Now Approve for Federal Age Discrimination Cases Under ADEA the "But For" Test Approved for Title VII Cases in McDonald v. Santa Fe Trail Transp. Co.

The decision of this Court in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), approves the requirement for Title VII cases that race be a "but for" cause of the employer action complained of—no more, no less. As we have seen, the Courts of Appeals seem to have approved semantic variations in jury instructions on liability for violation of ADEA which have proved to be troublesome. The First, Fourth and Seventh Circuits hold that to establish a violation of ADEA the plaintiff must prove that age was a "determining factor" in the "but for" sense.[22] The Second and Fifth Circuits have followed the Sixth in approving a requirement that the plaintiff prove that "age made a difference."[23] The Ninth Circuit appears in this case, and in its decision last year of *Kelly v. American Standard, Inc., supra,* to have approved either "determining factor" or "age made a difference," or "their equivalent." The insistence of the Ninth Circuit in this case that "the *Kelly* jury instruction" be given in the future may mean either that district courts are to give the instruction in *Kelly* quoted in the margin of its opinion here (672 F.2d at 1315n.2) or an unspecified "equivalent." Both the Ninth Circuit, and the Second in *Bentley v. Stromberg-Carlson, supra,* have suggested that there is no real difference between the "determining factor" and "age made a difference" tests, but we submit that both as a matter of

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22. *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1 Cir. 1979); *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4 Cir. 1981), *cert. denied* ..... U.S. ....., 102 S.Ct. 316 (Oct. 5, 1981); and *Kephart v. Institute of Gas Technology*, 630 F.2d 1217 (7 Cir. 1980).

23. *Laugesen v. Anaconda Co.*, 510 F.2d 307 (6 Cir. 1975); *Haring v. CPC International, Inc.*, 664 F.2d 1234 (5 Cir. 1981); and *Bentley v. Stromberg-Carlson Corp.*, 638 F.2d 9 (2 Cir. 1981).

liability substance and jury impact the contrary will be true in many cases.

It might well be that the present state of the law announced in the circuits would argue for a decision of this Court approving a uniform ADEA liability standard even if the striking decision of the Court of Appeals here to apply a new rule of harmless error were absent. But when one considers the further specifics of *this case* where (1) the Court of Appeals has affirmed a multimillion dollar judgment founded on a liability instruction the Court itself held to be error in "completely fail[ing] to give any guidance as to the meaning" of the liability standard, (2) the Court of Appeals brushed the error aside as harmless because plaintiffs' evidence was "ample" even though in dispute, and (3) the trial was complicated by the complexities of *McDonnell-Douglas* procedure compounded by submission of general verdicts which compelled the jury to decide ADEA and pendent state claims upon *different* liability standards in a single undifferentiated verdict,[24] one sees a decision which will surely spawn an array of problems for future age discrimination litigation so productive of needless misunderstanding and demands for appellate review as to call for the guiding hand of this Court in achieving clarity and uniformity.[25]

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24. We stress the statement of the Court of Appeals itself (672 F.2d at 1317) that when "state claims for breach of the implied covenant of good faith and fair dealing are joined to claims of age discrimination under the ADEA *** review of jury verdicts presents special difficulties to appellate courts **** If the state claims are flawed, the entire verdict may have to be reversed."

25. The vagary or variousness in the statements by the Courts of Appeals of the standard for ADEA age discrimination liability seems to have arisen in the course of unanimous rejection by the circuits, including the Ninth, that in an ADEA case the plaintiff must prove that age was a "sole factor." When counsel and the courts seek to divine what a liability standard is from decisions holding what it is not, a fertile field for confusion and misunderstanding exists. We submit that in ADEA cases, as in Title VII litigation, declaration of a uniform standard by this Court would be highly desirable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert S. Daggett
Attorney for Petitioner

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Appendix A

Philip D. CANCELLIER, John W. Costello and Zelma Smith Ritter,
Plaintiffs-Appellants/Cross-Appellees,

v.

FEDERATED DEPARTMENT STORES d/b/a I. Magnin,
Defendant-Appellee/Cross-Appellant.

Nos. 81-4154, 81-4165.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 16, 1981.
Decided March 30, 1982.

Robert S. Daggett, Brobeck, Phleger & Harrison, San Francisco, Cal., argued, for plaintiffs-appellants/cross-appellees (sic); Donald D. Connors, Brobeck, Phleger & Harrison, San Francisco, Cal., on brief.

Maureen McClain, Littler, Mendelson, Fastiff & Tichy, San Francisco, Cal., for defendant-Appellee/cross-appellant (sic).

Appeal from the United States District Court for the Northern District of California.

Before SNEED and PREGERSON, Circuit Judges, and EAST*, District Judge.

*sitting by designation.

SNEED, Circuit Judge:

The plaintiffs below and appellants here, Philip D. Cancelier, John W. Costello, and Zelma Smith Ritter, are former employees of I. Magnin, the defendant below and cross-appellant here. They won a jury verdict in the district court totalling $1.9 million, plus court-awarded attorneys' fees of $400,000, on their claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1976 & Supp. II 1978) and pendent state claims. They appeal denial of their motions for reinstatement and for an injunction against I. Magnin. I Magnin cross-appeals the judgment primarily on grounds of improper ADEA instructions, use of a general verdict, and an erroneous award of compensatory and punitive damages for breach of the implied covenant.[1] We affirm.

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1. I. Magnin also includes numerous other grounds in its appeal including failure to instruct on constructive discharge, failure to properly instruct on the method of calculating ADEA and breach of contract damages, partisan conduct, incorrect evidentiary rulings, incorrect award of attorneys' fees, failure to grant I. Magnin's motions for new trial or remittitur, and failure to grant I. Magnin's pretrial motion for separate trials.

I.
FACTS

Plaintiffs-appellants are former executives of I. Magnin. Cancellier was vice president for stores and operations. Costello was divisional merchandise manager for accessories. Ritter was a buyer of sportswear. In early 1978 they were terminated after having been employed at I. Magnin for twenty-five, seventeen, and eighteen years, respectively. In July 1979 they brought this action in the United States District Court for the Northern District of California alleging that their terminations violated the ADEA. They sought back pay, liquidated damages, reinstatement to their former positions, and an injunction against further age discrimination at I. Magnin. Appellants also raised claims

under California law for breach of employment contract and breach of the implied covenant of good faith and fair dealing. Costello sought additional relief claiming fraud in connection with a promise of future employment at I. Magnin.

After a six-week trial the jury returned general verdicts in favor of Cancellier in the amount of $800,000, Costello in the amount of $600,000, and Ritter in the amount of $500,000. The jury also returned verdicts in favor of I. Magnin on Costello's fraud claims. Both sides appeal. For convenience, I. Magnin's cross-appeal is discussed first.

II.

I. MAGNIN'S CROSS-APPEAL

A. *ADEA "Determining Factor" Standard*

The ADEA makes it unlawful for an employer to discharge any individual because of such individual's age. 29 U.S.C. § 623(a) (1976). In *Kelly v. American Standard, Inc.*, 640 F.2d 974, 984-85 (9th Cir. 1981), this court set out the requirements for a proper jury instruction on age discrimination. We adopted the "determining factor" test established in *Laugesen v. Anaconda*, 510 F.2d 307, 317 (6th Cir. 1975), and restated as a "but for" test in *Loeb v. Textron*, 600 F.2d 1003, 1019 (1st Cir. 1979). We rejected the argument that plaintiff must prove age was the sole factor in his discharge, and upheld a jury instruction stating that plaintiff has the burden of proving that one of the reasons he was terminated was because of his age, and that he should prevail if this factor "made a difference" in determining whether the plaintiff was retained or discharged.[2]

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2. The jury instruction summarized in *Kelly* is set out at greater length below.

INSTRUCTION NO. 9

The plaintiff has the burden of proving:

(1) that one of the reasons he was terminated was because of his age; and

(2) that as a result of the termination, he has suffered damage.

[1,2] The essence of a proper jury instruction under *Kelly* is that it require the jury to focus on the marginal effect of the age factor. Age need not be the sole factor in a discharge or other discriminatory practice. Conversely, it is not enough that age discrimination be present or even that it figure in the decision to fire; age must "make a difference" between termination and retention of the employee in the sense that, but for the presence of age discrimination, the employee would not have been discharged.

[3] Here the district judge instructed the jury that "[a]ge must be a determining factor in an employer's personnel policies or practices before violation of the Act occurs." The district judge completely failed to give any guidance as to the meaning of "determining factor" in lawsuits under the ADEA, or to refer to the *Laugesen* and *Loeb* test we adopted in *Kelly v. American Standard, Inc.* This was error. The words "determining factor" are not self-explanatory. In general, fair application of the Act requires the trial judge to formulate precisely what employer conduct the ADEA redresses and what employer conduct it leaves undisturbed. Because the attribute with which the statute is concerned comes to each of us in time, it will inevitably be present in a multitude of employee discharges. It will be a factor in many and a determining factor in some. It is only this last group that can obtain

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Title 29, Section 623(f), United States Code, provides that it shall not be unlawful for an employer to discharge any individual from his employment, or classify his employees in any way, for good cause or where the discharge or classification is based on reasonable factors other than age.

You are instructed that there may be more than one factor in defendant's decision to terminate the plaintiff's employment; but plaintiff is nevertheless entitled to recover if one such factor was his age and if, in fact, it made a difference in determining whether or not the plaintiff was retained or discharged . . . .

See Kelly v. American Standard, Inc., 640 F.2d 974, 984-85 (9th Cir. 1981).

relief under the ADEA, even though, in the broad sense, it aims to benefit the entire aged employment force.

[4] [However, a careful reading of the transcript and record convinces us that in this case the instruction does not require reversal. Giving it was harmless error. There is little or no indication in the proceedings that the outcome would have changed if the *Kelly* jury instruction had been given. This case was not decided by a hairsbreadth. There was ample evidence that consideration of age "made a difference" in the termination of Cancellier, Costello, and Ritter. Moreover, it was conceded at oral argument that the challenged instruction was fashioned by the judge from language submitted by I. Magnin. While we are extremely reluctant to affirm verdicts based on jury instructions different from those approved in *Kelly* or their equivalent,[3] we find that on the facts of this case refusing a new trial is consistent with substantial justice. Fed.R.Civ.P.61; *Ginsburg v. Ginsburg*, 276 F.2d 94, 96 n.2 (9th Cir. 1960); 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 61.11 & n.1a (2d ed. 1979). The instruction aproved in *Kelly* adequately protects against mistaken inferences either that age must be the sole factor in the discharge, or that age may be less than a "but for" cause of the discharge. It is strongly preferred. Here, however, we find the error harmless.] [*See* Amendment, Appendix B.]

B. *Use of General Verdict*

I. Magnin contends that the district court committed reversible error by using simple general verdict forms without requiring special interrogatories or any breakdown of the verdict by source of damages.[4] Thus, I. Magnin contends, the possibility of punitive damages not recoverable

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3. *See* note 2 *supra*.

4. The ADEA's proscription against age discrimination is enforced through express incorporation of the Fair Labor Standards

under the ADEA in this lawsuit[5] or of duplicative damages in the pendent state claims requires a new trial.

[5, 6] Submission of special interrogatories is a matter committed to the discretion of the district judge. Fed.R. Civ.P. 49(b); *Monsma v. Central Mutual Insurance Co.*, 392 F.2d 49 (9th Cir. 1968); 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 49.04 & n.3 (2d ed. 1981). A jury

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Act, 29 U.S.C. §§ 201-219 (1976), rather than through independent ADEA remedies. The ADEA provides at 29 U.S.C. § 626(b) that

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of section 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter....

Section 216(b) in turn makes employers liable for unpaid minimum wages or unpaid overtime compensation and "an additional equal amount as liquidated damages."

Thus, an employer who violates the ADEA is liable for back wages and benefits, as well as an additional equal amount as liquidated damages for willful violations. *Kelly v. American Standard, Inc.*, 640 F.2d 974, 978 (9th Cir. 1981). The award of liquidated damages is in effect a substitute for punitive damages and is intended to deter intentional violations of the ADEA. *Id.* at 979; *Dean v. American Security Insurance Co.*, 559 F.2d 1036, 1039-40 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066, 98 S.Ct. 1243, 55 L.Ed. 2d 767 (1978); *Douglas v American Cyanamid Co.*, 472 F.Supp. 298, 303 (D.Conn.1979).

5. The Fourth and Fifth Circuit Courts of Appeal have denied recovery for punitive damages, *see Walker v. Pettit Construction Co.*, 605 F.2d 128, 129-30 (4th Cir. 1979); *Dean v. American Security Insurance Co., supra*, although some federal district courts have held punitive damages are available, *see, e.g., Kennedy v. Mountain States Telephone & Telegraph Co.*, 449 F.Supp. 1008, 1009-11 (D.Colo. 1978). *See also Kelly v. American Standard, Inc.*, 640 F.2d at 983 & n.14 (citing cases). The availability of punitive damages under the ADEA is not an issue in this case, since the judge instructed the jury that punitive damages were not available, Reporter's Transcript 4079, and the parties have not objected to that instruction.

generally is not required to itemize the components that enter into an award of damages. *Neal v. Saga Shipping Co.*, 407 F.2d 481, 489 (5th Cir.), *cert denied*, 395 U.S. 986, 89 S.Ct. 2143, 23 L.Ed.2d 775 (1969), *cited in Frito-Lay, Inc. v. Local 137, International Brotherhood of Teamsters*, 623 F.2d 1354, 1365 (9th Cir. 1980), *cert. denied*, 449 U.S. 1013, 101 S.Ct. 571, 66 L.Ed.2d 472 (1981), *and cert. denied*, 448 U.S. 1112, 101 S.Ct. 922, 66 L.Ed.2d 841 (1981) (district court sitting as trier of fact not required to itemize damage award).

[7] When state claims for breach of the implied covenant of good faith and fair dealing are joined to claims of age discrimination under the ADEA, however, review of jury verdicts presents special difficulty to appellate courts. A general verdict may conceal punitive damages which may not be allowed under the ADEA. If the state claims are flawed, the entire verdict may have to be reversed. For these reasons, a separate verdict for each claim and a separate verdict on punitive damages is strongly preferred.

[8] Nevertheless, failure to submit special interrogatories was not an abuse of discretion. *See supra* p. 1317. The amounts awarded here are consistent with a reasonable award on the ADEA and pendent state claims. We find no reversible error. I. Magnin's claim that it is impossible to tell which plaintiffs prevailed on which of their claims is unpersuasive. The court submitted general verdict forms in favor of the defendant on each claim. The jury returned general verdict forms in favor of I. Magnin on Costello's fraud claim and Costello's negligent misrepresentation claim; clearly, all other claims were resolved in favor of the plaintiffs. The verdict is clear as to which plaintiffs prevailed on which claims.

C. *Tort Damages for Breach of the Implied Covenant*

Breach of the implied covenant

I. Magnin contends that a claim for breach of the implied covenant under the circumstances here is contrary to California law. The contention is without merit.

[9, 10] California law recognizes an implied covenant of good faith and fair dealing in certain contracts that neither party will do anything to deprive the other of the benefit of the contract. *See, e.g., Gruenberg v. Aetna Insurance Co.*, 9 Cal.3d 566, 578, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973) (en banc); *Comunale v. Traders & General Insurance Co.*, 50 Cal.2d 654, 658, 328 P.2d 198 (1958). California courts have recently applied the duty created by the implied covenant to the situation where the employee alleges no more than long service and the existence of personnel policies or oral representations showing an implied promise by the employer not to act arbitrarily in dealing with its employees. Such claims sound in both contract and tort and may give rise to emotional distress damages and punitive damages. *Pugh v. See's Candies, Inc.*, 116 Cal.App.3d 311, 171 Cal.Rptr. 917 (1981); *Cleary v. American Air Lines*, 111 Cal.App.3d 443, 168 Cal.Rptr. 722 (1980) (alternative holding). *See Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 179 n.12, 164 Cal.Rptr. 839, 610 P.2d 1330 (1980) (dicta). *Cf.* Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 Stan.L.Rev. 153 (1981) (arguing against application of implied covenant to employment context).

Preemption

[11-13] The ADEA does not preempt the award of tort damages on pendent state claims. *Kelly v. American Standard, Inc.*, 640 F.2d 974, 983 (9th Cir. 1981) (upholding emotional distress damages under state age discrimination statute). The award of tort damages on state claims here did not duplicate ADEA relief. Plaintiffs' ADEA claims were based on age discrimination in firing. Plaintiffs' con-

tract and covenant claims were based on I. Magnin's obligation not to deal arbitrarily or unfairly in terminating plaintiffs' employment, an obligation created by I. Magnin's personnel policies and the fact of long service by the employee.[6] Punitive and emotional distress damages for this violation, unavailable under the ADEA,[7] do not duplicate the ADEA award for back pay, lost benefits, and liquidated damages. While the wisdom of allowing open-ended state claims for breach of the implied covenant to coexist with ADEA claims whose financial redress Congress has carefully limited to specific damage elements, see 29 U.S.C. § 626(b) (1976); *Kelly v. American Standard, Inc.*, 640 F.2d at 983 n.14, is arguable, it is for Congress, not us, to decide whether state common law remedies trench too closely on the federal scheme. Pendent jurisdiction, of course, is a doctrine of discretion. We recognize that in appropriate circumstances dismissal of the state claims without prejudice is proper. *United Mineworkers v. Gibbs*, 383 U.S. 715, 726-27, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). Such circumstances may exist, for example, where the trial judge finds that the state issues predominate in terms of the comprehensiveness of the remedy sought, or that there is a sufficient likelihood of jury confusion in treating divergent legal theories of relief to justify separating state and federal claims. *Id.*

Notice

[14] I. Magnin contends that it did not have notice of plaintiffs' claims for *tort* (as opposed to *contract*) dam-

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6. These claims do not depend on age. Thus, while the requirement of long service makes it more likely that successful plaintiffs will be advanced in years, claims by plaintiffs who are outside the ADEA-protected age range of from forty to seventy years are certainly possible—*e.g.*, a suit by a thirty-seven year old plaintiff with twenty years of service.

7. *See* note 4 *supra*.

ages flowing from a breach of the implied covenant. Although the general verdict prevents us from determining with certainty the amount of punitive damages, they necessarily make up a significant portion of the award.[8] But the complaint alleging breach of the covenant implied in each plaintiff's employment contract was sufficient notice of plaintiffs' claim. No specific prayer for emotional distress or punitive damages is needed. A final judgment must grant the relief to which the prevailing party is entitled, "even if such party has not demanded such relief in his pleadings." Fed.R.Civ.P. 54(c). Moreover, plaintiffs' pretrial statement itemized the emotional distress and punitive damages sought. On these facts, I. Magnin's claim of inadequate notice is without merit.

Punitive damages

[15, 16] A jury may award punitive damages if it finds by a preponderance of the evidence that defendant was guilty of malice, oppression, or fraud. Cal.Civ.Code § 3294 (West 1981); *Egan v. Mutual of Omaha Insurance Co.*, 24 Cal.3d 809, 819, 169 Cal.Rptr. 691, 620 P.2d 141 (1979). It is a question for the jury whether defendant's conduct was fraudulent, malicious, or oppressive. *Id.* at 821, 169 Cal.

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8. The $1.9 million verdict exceeds the maximum allowable award for back pay and benefits under the ADEA consistent with the evidence by approximately $640,000. Thus, $640,000 is the minimum amount that could have been awarded as punitive (or pain and suffering) damages on pendent state claims.

Plaintiffs' expert witness presented evidence claiming back pay and benefits in the amount of $338,786 for Cancellier, $231,730 for Costello, and $197,097 for Ritter. Plaintiffs' Trial Exhibit 52. If, after deductions of $70,000, $22,500, and $47,500 for severance pay and interim earnings, Plaintiffs' Responding Brief 48-49, the jury doubled these amounts in an award of liquidated damages, then punitive damages on pendent state claims must have been awarded in amounts of approximately $260,000, $180,000, and $200,000, respectively. *See supra* p. 1315; Plaintiffs' Responding Brief, *supra*. Actual punitive damages may have been higher. *See* Defendant's Opening Brief 45 n.38.

Rptr. 691, 620 P.2d 141. The evidence before the jury adequately supported a finding against I. Magnin on the issue of punitive damages.

D. *Other Alleged Errors*

I. Magnin's additional claims of error are without merit.[9] A thorough review of the record below establishes that the trial was fairly and properly conducted.

III.

APPEAL OF CANCELLIER, COSTELLO, AND RITTER

A. *Reinstatement and Injunction*

[17, 18] The ADEA provides that "in any action brought to enforce [the Act] the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate . . . including without limitation judgments compelling employment, reinstatement or promotion . . . ." 29 U.S.C. § 626(b) (1976). Reinstatement is not a mandatory remedy; it lies within the discretion of the trial court after careful consideration of the particular facts of the case. *Combes v. Griffin Television, Inc.*, 421 F.Supp. 841, 846 (W.D.Okl.1976). Ordinarily a verdict for plaintiff on the age discrimination claim is *res judicata* on plaintiff's equitable reinstatement claim. *Cleverly v. Western Electric Co.*, 450 F.Supp. 507, 511 (W.D.Mo.1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979). However, courts have refused to grant reinstatement where the employer continued a reduction in force for permissible business reasons, *id.*, or where discord and antagonism between the parties made it preferable to fashion relief from other available remedies, *Combes v. Griffin Television, Inc., supra*, at 846-47.

[19] Damages in lieu of reinstatement may be awarded

9. *See* note 1 *supra*.

in addition to liquidated damages. However, the value of reinstatement is often speculative.[10] Thus, availability of a substantial liquidated damages award may be a proper consideration in denying additional damages in lieu of reinstatement. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1021-23 (1st Cir. 1979).

[20] The trial judge in this case denied reinstatement because he found evidence of acrimony in the record and because he was "fully satisfied that [the verdict] has made the plaintiffs whole." Clerk's Record 124. The court noted the testimony of an I. Magnin officer who referred to plaintiff Ritter as a "cancer." I. Magnin's numerous attacks during the trial on plaintiffs' abilities support the trial judge's conclusion that plaintiffs and I. Magnin could no longer "co-exist in a business relationship that would be productive to the consumer, community or to the business itself." Clerk's Record 125. By virtue of his position in conducting the trial, the judge was peculiarly well-situated to observe the demeanor of plaintiffs and defendants in making this determination. Moreover, in view of the substantial verdict the judge did not abuse his discretion in finding that it had made the plaintiffs whole.

[21] Like the reinstatement remedy, injunctive relief is available under the ADEA when appropriate. The trial judge found that the $2.3 million judgment against I. Magin, including attorneys' fees, was sufficient to discourage I. Magnin from practicing age discrimination in the future. This finding was not an abuse of discretion.

B. *Attorneys' Fees on Appeal*

[22] A grant of fees on appeal is within the discretion

10. A possible exception would be cases involving the breach of employment contracts of specified duration.

of the appellate court. *Kelly v. American Standard, Inc.*, 640 F.2d 974, 986 (9th Cir. 1981). Although plaintiffs did not prevail on their reinstatement and injunction claims, an award of fees on appeal in some amount is appropriate to reflect successful defense of the verdict below. *See id; Cleverly v. Western Electric Co.*, 594 F.2d 638, 642 (8th Cir. 1979) (fees awarded to plaintiff denied reinstatement). We remand to the district court for a determination of the proper amount.

IV.

CONCLUSION

While the instructions approved in *Kelly v. American Standard, Inc., supra,* and separate verdict forms for each claim, as well as a separate verdict form for punitive damages, are preferred, the trial judge did not commit reversible error in instructing the jury on "determining factor" under the ADEA, in using a general verdict, or in allowing tort damages on pendent state claims. Nor was denial of plaintiffs' motions for reinstatement and for injunctive relief against continuing age discrimination at I. Magnin an abuse of discretion. Plaintiffs are entitled to reasonable attorneys' fees in light of the outcome on appeal. The judgement of the district court is affirmed.

AFFIRMED.

Appendix B

Filed—May 27 1982
Phillip B. Winberry
Clerk, U.S. Court of Appeals

In the
United States Court of Appeals
For the Ninth Circuit

Nos. 81-4154, 81-4165

PHILIP D. CANCELLIER, JOHN W. COSTELLO
and ZELMA SMITH RITTER,
Plaintiffs-Appellees/Cross-Appellants,

v.

FEDERATED DEPARTMENT STORES d/b/a I. MAGNIN,
Defendant-Appellant/Cross-Appellee.

ORDER

Before: SNEED and PREGERSON, Circuit Judges
and EAST*, District Judge

The panel as constituted in the above case has voted to amend its March 30, 1982 opinion by inserting in place of the paragraph beginning on page 4, line 12, and ending on page 5, line 2, of the slip opinion the following paragraphs:

> An erroneous ruling which relates to the substantial rights of a party is grounds for reversal unless it affirmatively appears from the whole record that it was not prejudicial. *McCandless v. United States,* 298 U.S. 342, 347-48 (1936). This is especially true of an

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

error in jury instructions. *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919). However, a careful reading of the transcript and record convinces us that in this case the instruction does not require reversal. Giving it was harmless error.

There is no indication in the proceedings that the outcome would have changed if the *Kelly* jury instruction had been given; to the contrary, it affirmatively appears from the record that the instruction did not prejudice defendant. This case was not decided by a hairsbreadth. There was ample evidence that consideration of age "made a difference" in the termination of Cancellier, Costello, and Ritter. *Cf. Van Domelen v. Westinghouse Electric Corp.*, 382 F.2d 385, 387 (9th Cir. 1967) (ample evidence of forbearance); *TSS Sportswear, Limited v. Swank Shop (Guam), Inc.*, 380 F.2d 512, 522, 523 (9th Cir. 1967) (overwhelming support in record for result below). Unlike the instructions given in cases requiring reversal, which affirmatively stated an erroneous version of the law, *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 420-21 (1926); *Fillipon, supra* at 83-84, or forbade the jury to consider what it properly should have considered, *McCandless, supra* at 345, the trial judge's instruction here was merely an unelaborated version of the correct standard. Significantly, the challenged instruction was fashioned by the judge from language submitted by I. Magnin.

While we are extremely reluctant to affirm verdicts based on jury instructions different from those approved in *Kelly* or their equivalent,[3] we find that on the facts of this case refusing a new trial is consistent with substantial justice. Fed. R. Civ. P. 61; *Ginsburg*

v. Ginsburg, 276 F.2d 94, 96 n.2 (9th Cir. 1960); 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 61.11 & n.1a (2d ed. 1979). The instruction approved in *Kelly* adequately protects against mistaken inferences either that age must be the sole factor in the discharge, or that age may be less than a "but for" cause of the discharge. It is strongly preferred. Here, however, where the record convincingly rebuts any presumption of prejudice, we find the error harmless.

With the opinion so amended, the panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix C

In the

United States Court of Appeals

For the Ninth Circuit

Nos. 81-4154, 81-4165

PHILIP D. CANCELLIER, JOHN W. COSTELLO
and ZELMA SMITH RITTER,
Plaintiffs-Appellants/Cross-Appellees,

v.

FEDERATED DEPARTMENT STORES d/b/a I. MAGNIN,
Defendant-Appellee/Cross-Appellant.

PETITION OF DEFENDANT-APPELLEE/CROSS-APPELLANT FEDERATED DEPARTMENT STORES, INC. d/b/a I. MAGNIN FOR REHEARING WITH A SUGGESTION OF THE APPROPRIATENESS OF REHEARING EN BANC

PRELIMINARY STATEMENT AND CERTIFICATE OF COUNSEL

I. Magnin respectfully petitions for rehearing, and suggests the appropriateness of rehearing *en banc*, of a single issue, *viz.*, was not the error[1] committed by the district court in instructing the jury prejudicial to Magnin's substantial rights, rather than harmless as the opinion says? That question has never been briefed or argued anywhere in the litigation, yet the holding of the Panel on it is the

1. After careful discussion of the ADEA liability instruction the court below gave the jury, the Court said (Op., p. 3), "This was error."

sole foundation for this Court's judgment against Magnin. Both sides assumed in their briefs and at the argument that if Magnin's contentions about error in the jury instructions were accepted by the Court, as they *were* in the opinion, that the judgment would be reversed. Plaintiffs confined themselves to submitting that the instruction on liability for age discrimination under the ADEA was in all respects correct (see Pl. Resp. Br., p. 11). Hence the Court has yet to hear from counsel on whether the errors of the district court, emphatic yet careful discussion of which takes up the bulk of the opinion, were prejudicial or harmless.[2]

We certify[3] to our belief that the decision of the Panel filed March 30, 1982:

> (1) While holding emphatically that the court below committed error by "completely fail(ing) to give (the jury) any guidance as to the meaning of (the) 'determining factor'" finding the jury had to make before returning any ADEA verdict for plaintiffs, and holding just as emphatically that the district court went against the strong preference of the law in this Circuit in permitting the jury to find for plaintiffs on general verdicts rather than submitting separate verdicts on the state and federal claims (and on punitive

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2. While the Court used the flat language of error when it discussed the jury instructions, and in describing submission of the general verdicts used slightly different language—that use of general verdicts here violated or departed from a strong preference of the law in cases like this one—we also are aware that the opinion uses the words "strongly preferred" (Op., 5:1, 5:32) to describe what the court below should have done in respect of both instructions and the general verdict. We refer to both as error because we believe the Court intended to admonish the District Courts that what was done here must not be repeated in future cases.

3. Pursuant to F.R.A.P., Rule 40, and the instruction in the Notice of Entry of Judgment.

damages), the Panel also decided that what occurred was harmless error requiring no new trial—and we submit that in so deciding the Panel overlooked decisions of both this Court and the Supreme Court on the test for prejudicial or harmless error in jury instructions;

(2) While the opinion treats in the traditional fashion as separate issues (a) the error of the Court below in instructing the jury and (b) the unwisdom of permitting the jury to return general verdicts which lumped decision of federal and state claims together, in so doing the Panel overlooked the *cumulative* effect of both errors and that "their cumulative effect was prejudicial," *Gordon Mailloux Ent. v. Fireman's Ins. Co. of Newark, N.J.*, 366 F.2d 740, 742 (9 Cir. 1966), *Northern Pacific Railway v. Herman*, 478 F.2d 1167 (9 Cir. 1973), because the jury in this case, spurned in its plea for further instruction on age discrimination under ADEA, inevitably found that I. Magnin violated ADEA not upon the federal standard which governs ADEA liability, but upon a different, prejudicial standard of California law for liability for employee terminations the jury thought to be unfair; and

(3) In treating the errors as harmless and hence to require no new trial—through an opinion which treated them as separate and distinct for purposes of traditional appellate review and analysis rather than as errors which cumulated or coagulated at the trial into overall prejudicial error—the decision has created a dangerous new doctrine of harmless error for ADEA age discrimination cases and thus failed to accomplish its implicit statement of purpose to clarify the law in this Circuit for ADEA cases tried to District Court juries in the future.

THE UNBRIEFED AND UNARGUED RATIONALE FOR THE JUDGMENT AGAINST MAGNIN— AND HOW THE ERRORS THE COURT FOUND COMBINED WITH EACH OTHER TO PREJUDICE MAGNIN'S SUBSTANTIAL SUBSTANTIVE RIGHTS

The judgment of this Court against Magnin, as we stated at the outset, rests upon the ultimate conclusion that the errors the court below committed were harmless. Since both sides assumed in both their briefs and arguments that the error Magnin claimed in the ADEA instructions would be reversible error, the question of reversible or harmless error has never been addressed by counsel, yet the ultimate conclusion and judgment of the Court rests upon it.

Although the opinion insists that the District Courts refrain in the future from giving the ADEA liability instructions the court below gave the jury here and give, instead, an instruction conforming with *Kelly,* and warns no less pointedly of the future consequences of failure to submit separate jury verdicts on federal, state and punitive damage claims, we believe that the opinion also has created a new doctrine of harmless error for federal age discrimination cases under the ADEA which will be just as dangerous in future age litigation in the District Courts as the errors the opinion so capably identifies and discusses. There should be no special rules for ADEA cases, of course. And this means not only that there must be no special body of law creating new or unfamiliar obstacles to recovery for violation of ADEA *but also that settled law on determination of the harmless or prejudicial nature of error in civil cases, and the right to a new trial for a litigant whose substantial rights have been prejudiced on matters of substance, must be applied equally to federal age cases as in all other civil litigation.* There is nothing in ADEA, which admittedly

intrigues with new questions over an "attribute *** which *** comes to each of us in time,"[4] to inspire a new doctrine of harmless error to brush aside errors of the magnitude found by the Court here—no matter how this Court views, or the District Courts in other cases may view, the weight of the evidence against the defendant. There is nothing in the ADEA to justify or require a departure from settled principles which would have entitled I. Magnin to a new trial in another kind of case as a result of the prejudice to its substantial rights from the errors here.

It is for these reasons that we suggest, with deference, the appropriateness of rehearing *en banc*.

The opinion of the Court and the judgment it entered stand in sharp contrast with each other. The opinion of the Panel[5] identifies and discusses the missteps of the district court in language more powerful than that used by the Court in other cases to reverse a judgment. Each of Magnin's main submissions on appeal is upheld in the opinion. We have no doubt that the discussion in the opinion of "determining factor" and the need for separate verdicts will be a landmark and the source of governing law in this Circuit and elsewhere for years to come in jury trials of age discrimination cases, but its view that the errors on those matters were harmless in this case is likely to be dangerous. Before turning to the way in which Magnin's submissions adopted by the Court show reversible error when viewed *together* as they occurred at the trial rather than separately in the traditional manner of an appellate opinion, we take the language of the opinion itself to de-

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4. Op., p. 4.

5. One of whose members at argument questioned us relentlessly on whether or not we did everything we could have done at the trial to warn the district court away from the errors this Court's opinion finds. As to this, see *infra*, pp. 8-9.

scribe what occurred and the reasons the Panel gave in warning that what occurred must not occur again in an ADEA jury case in this Circuit.

The Error in the Determining Factor Instructions[6]

The opinion says (pp. 3-5):

> "Here the district judge instructed the jury that '(a)ge must be a determining factor in an employer's personnel policies or practices before violation of the Act occurs.' *The district judge completely failed to give any guidance as to the meaning of 'determining factor' in lawsuits under the ADEA,* or to refer to the *Laugesen* and *Loeb* test we adopted in *Kelly v. American Standards, Inc. This was error.* The words 'determining factor' *are not self-explanatory.* In general, fair application of the Act requires the trial judge to formulate precisely what employer conduct the ADEA redresses and what employer conduct it leaves undisturbed. Because the attribute with which the statute is concerned comes to each of us in time, it will inevitably be present in a multitude of discharges. *It will be a factor in many and a determining factor in some. It is only this last group that can obtain relief under the ADEA,* even though, in the broad sense, it aims to benefit the entire aged employment force.***
>
> "**** While we are extremely reluctant to affirm verdicts based on jury instructions different from those approved in *Kelly* or their equivalent, we find that on the facts of this case refusing a new trial is consistent with substantial justice. Fed. R. Civ. P. 61; *Ginsburg v. Ginsburg,* 276 F.2d 94 (9th Cir. 1960); 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 61.11 & n.1 (2d ed. 1979). *The instruction approved in Kelly adequately protects against mistaken inferences either that age must be the sole factor in the discharge, or that age may be less than a "but for" cause of the discharge. It is strongly preferred."*

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6. Emphasis in matter quoted here has been supplied.

Error in Permitting the Jury to Return General Verdicts

The Court said (Op, p. 5):

> "When state claims for breach of the implied covenant of good faith and fair dealing are joined to claims of age discrimination under the ADEA, however, *review of jury verdicts presents special difficulty to appellate courts.* A general verdict may conceal punitive damages which may not be allowed under the ADEA. *If the state claims are flawed, the entire verdict may have to be reversed. For these reasons, a separate verdict for each claim and a separate verdict on punitive damages is strongly preferred.*"

The Cumulative Prejudicial Effect of These Errors: The State Claims Truly Flaw the ADEA Verdict Here

Simply put, the erroneous instructions, which "completely failed to give any guidance as to the meaning of 'determining factor'," permitted the jury to find, and the record shows the jury did find, damages against Magnin for ADEA age discrimination upon a California law standard for recovery of tort damage for breach of an implied covenant of fair dealing different and looser than what is required to recover for violation of the federal statute; *and since the form of verdict makes it impossible to hold that the jury did not substitute the implied covenant liability standard in deciding the ADEA age case, as separate verdicts might have done, the error must be regarded by this Court as prejudicial to Magnin's substantial rights and hence to require reversal.*

We do not here explicate again the content and shortcomings of the ADEA determining factor instruction given by the district court, because the words of the opinion quoted above do that exactly. But we do call urgent atten-

tion to the instructions the district court gave the jury on breach of the implied covenant (R. Tr. 4086-4087):

> "This duty of good faith and fair dealing forbids either party from *doing anything* which will interfere with the right of the other to receive the benefits of the agreement. The implied duty imposes on each party the obligation to do everything that the contract presupposes they will do to accomplish its purposes.
>
> *"Liability for an employer's breach of the duty of good faith and fair dealing is imposed for failure of the employer to act in good faith and to deal fairly* rather than arbitrarily in the performance of its obligations under an employment contract so as not to frustrate the purpose of the employment contract or to deny to the employee the benefits of such a contract.
>
> "It is not necessary to prove actual dishonesty, fraud or concealment in order for a plaintiff to recover damages for breach of the implied duty of good faith and fair dealing.
>
> "Each plaintiff contends that I. Magnin breached its covenant of good faith and fair dealing. If you find that a plaintiff failed to prove that I. Magnin breached its covenant of good faith and fair dealing, then you must return a verdict for defendant I. Magnin on that plaintiff's breach of covenant claim.
>
> *"If you find that a plaintiff has proved by a preponderance of the evidence that I. Magnin did, in fact, breach its covenant of good faith and fair dealing, then you may return a verdict for that plaintiff on his or her breach of covenant claim."*

Within minutes after the jury retired, this occurred (Rtr. 4108):

> "I just received a note, dated 1/15/81, 13:30 hours, from the jury, that reads as follows:
>
> *"'The jury* in C 79-1591 RPA *requests review of your interpretation of ADEA.'*
>
> "I interpret that to mean that they want a reread of jury instructions.

"Accordingly, I am going to reread the following instructions, which—as given by me. I'm going to give them to you in the order in which they were given by me. And they're marked Defendant's 21, Plaintiffs' 34, Plaintiffs' 35, Defendant's 21, as amended, and that's it.

"Do you wish me to repeat them.?

"Ms. De Oddone: No, Your Honor, I have it.

"The Court: Mr. Connors?

"I'm sorry. I thought you had them in front of you.

"Mr. Connors: No. I think I know what they are.

"The Court: They're the Age Discrimination In Employment Act of '67, order and burden of proof under ADEA, demotion in violation of ADEA, Age Discrimination in Employment Act of 1967."

Then (*id.* at 4109-4110) the district court *reread* to the jury the very instructions this Court has held "completely failed to give any guidance as to the meaning 'determining factor' in lawsuits under the ADEA." And, the opinion holds, "This was error" (Op., p. 3).

If the district court, amply warned by the jury's note, had submitted verdicts to the jury on ADEA and the implied covenant claims separately, then it would be possible for the reviewing Court to believe that the jury *might* have applied the ADEA standard of *Kelly*, even though not instructed upon it, and not the looser California liability standard for implied covenant claims. The opinion teaches plainly that jury resort to the California implied covenant standard in deciding the federal ADEA case would be a misstatement and misshaping of *federal* law,[7] and that is what happened here.

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7. We ask the Court to recall that experienced lead trial counsel for Magnin warned on the record (R.Tr. 3960) that "the omission of 22, 23, 24, 24a, 24b and 26 take away the heart of the defense. That is to say that the discharge, the 'but for' factor, is not contained in any of the instructions Your Honor proposes to give."

In like manner, plaintiffs' lead trial counsel (R. Tr. 3961-3963) forcefully warned the district court that adequate instructions on determining factor "must be given."

The conclusion is rational, probable and comfortable that the trial jury, whose dismay or confusion over the correct ADEA determining factor standard was meticulously expressed to the court below on the record, simply applied—because no other guidance was given—the different standard for breach of the implied covenant to hold Magnin liable in damages for age discrimination under the ADEA, in the language of the covenant instructions, "for failure to act in good faith and to deal fairly" with plaintiffs. Lacking any explanation at all of the meaning of the standard for liability on the federal age claim—a state of affairs emphatically declared by both the opinion of this Court and the jury's note to the district judge—the jury's verdict in this case, we submit, could not have been founded on any standard other than the state law instruction that liability might be imposed if the jury regarded plaintiffs' terminations as unfair.

That prejudiced Magnin's substantial rights[8] and such is the standard for reversible error, as we now show.

THE STANDARD FOR TESTING FOR REVERSIBLE OR HARMLESS ERROR IN JURY INSTRUCTIONS: ERROR IN INSTRUCTIONS ON SUBSTANCE IS PRESUMED PREJUDICIAL

The opinion cites as sole authority for the holding that the ADEA instructions were only harmless error, F.R. Civ. P., Rule 61; *Ginsburg v. Ginsburg*, 276 F.2d 94 (9 Cir. 1960); and *Moore's Federal Practice*, and for its separately

8. One such right is found in the award here of nearly half a million dollars in attorneys' fees against Magnin. The right to fees exists only under ADEA. The award of fees in this case is tantamount to recovery of attorneys' fees under California law which provides no such right.

discussed and reasoned holding that issues over jury verdict forms are committed to the discretion of the district judge, Rule 49(b); *Monsma v. Central Mutual Insurance Company*, 392 F.2d 49 (9 Cir. 1968); and Moore.[9] Moore pointedly includes in the cited discussion, as a *caveat* (5A Moore's *Federal Practice* para. 49.04, p. 49-38, 2d.ed. 1981):

> "When a general verdict is to be returned, the charge of the court must necessarily be more comprehensive than that where only a special verdict is returned."

The cited decision of this Court in *Ginsburg* illustrates the standard for determining whether error is harmless or prejudicial in a much different kind of case. The defendant filed a notice of appeal from an order denying his motion for a new trial and to set aside the judgment, but no appeal from the judgment itself was taken. This Court applied 28 U.S.C. Sec. 2111 ("the court shall give judgment *** without regard to errors or defects which do not affect the substantial rights of the parties") in holding that the defendant would be deemed to have filed a notice of appeal from the judgment. The citation to Moore provides, in addition to the *caveat*, a general discussion of Section 2111, and parallel language in Rule 61, as applied to "niceties of form."

Determination of the harmless or reversible nature of error in jury instructions on substance, however, is a different matter, as decisions of this Court and the Supreme Court not cited in the opinion show. Nothing in Rule 61, Section 2111 (formerly Judicial Code Sec. 269, 28 U.S.C.

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9. And for the proposition that neither judge nor jury trying the facts is required to itemize damages, a point we think wide of the mark, *Neal v. Saga Shipping Co.*, 407 F.2d 481, 489 (5th Cir.), *cert. denied*, 395 U.S. 986 (1969), *cited in Frito-Lay, Inc. v. Local 137, International Brotherhood of Teamsters*, 623 F.2d 1354, 1365 (9th Cir. 1980), *cert. denied*, 449 U.S. 1013 (1981), *and cert. denied*, 448 U.S. 1112 (1981).

Sec. 391) or case authority calls upon a reviewing court to determine what a jury in a new trial might do.[10] The inquiry is what the jury which decided the case on appeal could be said to have done or not done.

The Advisory Committee Notes on Rule 61, after first confirming its lineage from Section 2111 (formerly Sec. 391) and also from Section 777, direct the reader to the decision in *McCandless v. United States,* 298 U.S. 342 (1936), where the Court held rejection of certain evidence to require reversal. The Court said (298 U.S. at 347-348):

> "In this situation Section 269 is not controlling. That section simply requires that judgment on review shall be given after an examination of the entire record 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial. *United States v. River Rouge Co.,* 269 U.S. 411, 421; *Fillippon v. Albion Vein Slate Co.,* 250 U.S. 76, 82; *Williams v. Great Southern Lumber Co.,* 277 U.S. 19, 26" (Underscoring in original.)

Accord: United States v. River Rouge Co., 269 U.S. 411 (1926); *Kotteakos v. United States,* 328 U.S. 750 (1946);[11]

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10. See Traynor, *The Riddle of Harmless Error* (Ohio Univ. Press 1970), p. 27.

11. 328 U.S. at 765:

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phrase affected by the error. It is rather, even so, whether the error itself had substantial influence."

and, especially, *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76 (1919).[12]

Just as the decisions of the Supreme Court distinguish carefully between technical, formal matters and matters of substance in deciding whether an error at trial was prejudicial or harmless, so do decisions of this Court not cited in the opinion. We have already cited *Gordon Mailloux Ent. v. Fireman's Ins. Co. of Newark, N.J., supra,* on the coagulation of one or more harmless errors into error which is prejudicial overall. Even more closely in point are the decisions of this Court in *Almaraz v. Universal Marine Corp.*, 472 F.2d 123 (9 Cir. 1973), *Northern Pacific Railway v. Herman,* 478 F.2d 1167 (9 Cir. 1971), and *Pollock v. Koehring Co.*, 540 F.2d 425 (9 Cir. 1976). *Almaraz,* a longshoreman's action for injuries received in unloading cargo, holds (472 F.2d at 124):

"The defendant objected to this charge (i.e., on contributory negligence), arguing that the instruction

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12. 250 U.S. at 81-82:

"The Circuit Court of Appeals considered that the jury had asked a plain question in writing concerning a matter of law, and the judge had answered it in writing plainly and accurately, and were of the opinion that since nothing else had occurred—the question and answer having been preserved of record and counsel having been promptly notified of what had taken place and given the opportunity of excepting to the substance of the instruction and to the manner of giving it—no harm had been done, and none was probable to arise under like circumstances, and hence affirmed the judgment.****

"**** And of course in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless.

"In this case, so far from the supplementary instruction being harmless, in our opinion it was erroneous and calculated to mislead the jury *in that it excluded a material element that needed to be considered in determining whether plaintiff should be held guilty of contributory negligence under the particular hypothesis referred to in the jury's question.*"

failed to provide a standard against which the jury could measure Almaraz's behavior. We agree.

"Although the trial judge informed the jury that Almaraz should have exercised ordinary care, he did not state that the standard of conduct required to avoid negligence was that of a reasonably prudent person under similar circumstances. This failure allowed the jury to employ any standard it might choose: a friend, a juror or even Almaraz as the standard. We hold that this omission constituted reversible error."

In *Northern Pacific Railway*, the Court applied the test of *Fillippon v. Albion Vein Slate Co., supra*, for harmless or prejudicial error in jury instructions and held (478 F.2d at 1171):

"After reading the entire instruction it appears to this court that the instruction was confusing and left the jury with the mistaken impression that estoppel was a complete defense to both of plaintiff's causes of action, and it was not. The instruction is prejudicial because it is confusing and inconsistent on a material issue and could possibly mislead the jury.

"Error in a specific instruction is not cured by general statements which set out the respective contentions. *See United States v. Natt McDougall Co.*, 381 F.2d 686 (9th Cir. 1967). But even in the general instructions the trial court did not make it clear that either of plaintiff's theories would support recovery.

"Erroneous instructions in a jury trial are presumptively injurious and are grounds for reversal unless it affirmatively appears on the record that the error was harmless. *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 39 S.Ct. 435, 63 L.Ed. 853 (1919). As this Court said in *Pacific Greyhound Lines v. Zane*, 160 F.2d 731 (9th Cir. 1947):

" 'Nothing in the record enables us to ascertain upon which theory of fraud the jury may have

rested its general verdict. The presence of these conflicting instructions provides no assurance that the error did not materially affect the jury's verdict. *Id.* at 737.'

"Since there is nothing in this record which affirmatively shows upon what theory the jury based its general verdict for defendant, the case must be reversed and remanded."

And in *Pollock*, where the Panel included Judge East, the Court held (540 F.2d at 426-427):

"The only question before us is whether this error requires reversal. Both parties to this appeal have cited California law on the issue. If it applied, *Henderson* would dictate reversal. Although we look to state law for the correct substance of jury instructions, the question whether an incorrect instruction is prejudicially erroneous is a procedural one requiring application of federal law. *Lones v. Detroit, Toledo and Ironton Ry. Co.*, 398 F.2d 914, 920 (6th Cir. 1968), *cert. denied*, 393 U.S. 1063, 89 S.Ct. 714, 21 L.Ed.2d 705 (1969); *accord, Seltzer v. Chesley*, 512 F.2d 1030, 1035 (9th Cir. 1975); *see* Rule 51, Fed.R.Civ.P.

"Our inquiry is, therefore, whether, looking to the instructions as a whole, the substance of the applicable law was fairly and correctly covered. *Bolden v. Kansas City Southern Ry. Co.*, 468 F.2d 580 (5th Cir. 1972). In making this inquiry, we note that both inconsistent or equivocal instructions and incorrect statements of the law may be prejudicially erroneous. *Bollenbach v. United States*, 326 U.S. 607, 612, 66 S.Ct. 402, 90 L.Ed. 350 (1946); *United States v. Neilson*, 471 F.2d 905, 908 (9th Cir. 1973); *Bolden v. Kansas City Southern Ry. Co., supra*, 468 F.2d 580; *Ratay v. Lincoln National Life Ins. Co.*, 378 F.2d 209 (3d Cir.), *cert. denied*, 389 U.S. 973, 88 S.Ct. 472, 19 L.Ed.2d 465 (1967). We also note that the portions of the instructions read shortly

before the jury retires are critical. *Norfleet v. Isthmian Lines, Inc.*, 355 F.2d 359, 362 (2d Cir. 1966).

"We hold, consistent with the state court in *Henderson*, that the instructions in this case require reversal. Taken as a whole, they were both erroneous and inconsistent."[13]

CONCLUSION

The opinion filed March 30, 1982, holds emphatically that the trial of this case, surely to be viewed in later years as a landmark in age discrimination litigation burgeoning today as Title VII cases did ten years ago, was affected with errors so profound as to move the Panel to state explicitly in its opinion how the errors it found are to be avoided by the District Courts in future ADEA jury trials. We respectfully submit that in its analysis of the errors below as separate things and its conclusion that the errors viewed separately were harmless, the Panel either overlooked decisions of the Supreme Court and this Court on the application of Rule 61 and Section 2111 to error in jury instructions on liability compounded and amplified by submission of a general verdict,[14] or that the Panel decided not to follow this body of law for reasons not stated in its opinion.

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13. See Traynor, *op. cit. supra*, p. 74:
"If an instruction relates to a substantial element of the appellant's case, an appellate court would not find it highly probable that the error did not influence the verdict."

14. A possibility which the authors of *Moore's Federal Practice* explicitly recognize in the passage cited by the Panel in its discussion of the form of verdict here, *supra*, p. 10.

The errors found by the Court in its opinion of March 30, 1982, were prejudicial, not harmless, and I. Magnin is entitled to reversal of the judgment appealed from and to an order remanding for a new trial.

Respectfully submitted,

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Appendix D-1

Excerpts From Plaintiffs' Complaint

I

NATURE OF THE CASE

This is an action brought by three retailing executives, PHILIP D. CANCELLIER, JOHN W. COSTELLO, and ZELMA SMITH RITTER, against their former employer, FEDERATED DEPARTMENT STORES, INC., doing business as I. MAGNIN, alleging that they were unlawfully terminated as a result of their former employer's policies and practices of discrimination on the basis of age. In addition, each plaintiff alleges claims for damages for breach of the employment agreement between defendant and himself/herself. Plaintiff COSTELLO also alleges a claim for damages for deceit.

• • •

VI

FIRST CLAIM FOR RELIEF

A. *Plaintiff PHILIP D. CANCELLIER.*

Plaintiff CANCELLIER was hired as department manager with regional responsibilities by I. Magnin in April, 1953. After a seven month break in service between November, 1959, and June 9, 1960, plaintiff CANCELLIER returned to I. MAGNIN as a fine shoe buyer and was subsequently promoted Vice-President of the Southern Region in 1968, and then to increasingly more responsible positions within I. Magnin culminating with his appointment in 1975 as Vice-President Stores/Operations covering 23 retail stores, which was the position he held at the time of his termination.

On May 1, 1978, after a total of 25 years of wholly satisfactory, competent, and diligent performance to his em-

ployer's profit, plaintiff CANCELLIER was terminated by defendant on the basis of his age.

VII

In terminating plaintiff CANCELLIER, defendant willfully, knowingly, and intentionally discriminated against him on the basis of his age.

• • •

IX

B. *Plaintiff JOHN COSTELLO.*

Plaintiff COSTELLO was hired as a special executive trainee by I. Magnin on July 10, 1961, and was subsequently promoted to increasingly more responsible positions within I. Magnin, culminating with his appointment in 1975 as Divisional Merchandise Manager-Accessories responsible for 23 retail stores, which was the position he held at time of his termination.

On May 1, 1978, after approximately 17 years of wholly satisfactory, competent, and diligent performance to his employer's profit, plaintiff COSTELLO was terminated by defendant on the basis of his age.

In terminating plaintiff, defendant willfully, knowingly and intentionally discriminated against him on the basis of his age.

• • •

XI

C. *Plaintiff ZELMA SMITH RITTER.*

Plaintiff RITTER was hired as a salesperson by I. Magnin in August, 1959, and soon thereafter was promoted to Assistant Buyer, then Buyer on February 1, 1961, and was subsequently promoted to increasingly more responsible buying positions, culminating with the position of Buyer-

Sports Apparel for 23 retail stores, which was the position she held at the time of her termination.

On January 6, 1978, after 18 years of wholly satisfactory, competent, and diligent performance to her employer's profit, plaintiff RITTER was terminated by defendant on the basis of her age.

In terminating plaintiff RITTER, defendant willfully, knowingly and intentionally discriminated against her on the basis of her age.

• • •

XIII

The acts, policies and practices of defendant alleged herein violate Section 4 of the ADEA, 29 U.S.C. § 623, and Section 15 of the FLSA, 29 U.S.C. § 215.

• • •

XVIII

SECOND CLAIM FOR RELIEF

The allegations of Paragraphs I through V and the allegations of Paragraphs VI through XVII of the First Claim for Relief are realleged and incorporated herein by reference as though fully set forth.

• • •

XX

In 1977, in the City and County of San Francisco, California, each plaintiff and the defendant entered into an employment agreement contained in several writings, including, but not limited to, the Personnel Policies and Procedures Manual, the Retirement Income and Thrift Incentive Plan, the Executives Deferred Compensation Plan, the Employee Stock Ownership Plan, the employee handbook, and the Supplementary Retirement Plan for executives.

Defendant's Personnel Policies and Procedures Manual states at Index No. 40-10-3:

• • •

B. Age:

1. It is the policy of I. Magnin to conform to State and Federal laws regarding age discrimination."

• • •

XXI

Taken together, this total employment agreement constitutes an express agreement on the part of defendant not to terminate the employment of any of the plaintiffs for so long as his/her job performance was satisfactory or not detrimental to the interests of the Company and, in any case, not to terminate any of the plaintiffs on the basis of age. Each plaintiff understood said total employment agreement to have this effect.

• • •

XXV

THIRD CLAIM FOR RELIEF

The allegations of Paragraph I through V, the allegations of Paragraph VI through XVII of the First Claim for Relief, and the allegations of Paragraph XVIII through XXIV of the Second Claim for Relief are realleged and incorporated herein by reference as though fully set forth.

• • •

XXVII

Beginning in approximately January, 1978, and culminating with his termination on or about May 1, 1978, defendant breached its implied covenant of good faith and fair dealing with regard to plaintiff CANCELLIER by terminating his position and transferring the work to younger employees, attempting to camouflage this breach by making

a sham offer in bad faith of alternative employment, and by terminating him without regard to or compliance with the requirements of the employment agreement, all with the object of replacing plaintiff CANCELLIER with younger personnel, reducing salary costs, and avoiding its obligation to pay plaintiff CANCELLIER benefits under the Supplementary Retirement Plan for executive employees.

XXVIII

Beginning in approximately May of 1977 and continuing until his termination by defendant on or about May 1, 1978, defendant breached its implied covenant of good faith and fair dealing with respect to plaintiff COSTELLO by promising, without intent to perform, that if there was any change in his job assignment, he would be given another assignment at the same divisional level without loss of salary, by terminating him without offering him another assignment although openings existed for which he was qualified, by failing to appraise plaintiff COSTELLO for his 1977 work in accordance with the appraisal procedure for divisional merchandise managers and buyers carried out in March and April of 1978, and by terminating plaintiff COSTELLO without regard to or compliance with the requirements of the employment agreement, all with the object of replacing plaintiff COSTELLO with younger personnel, reducing salary costs, and avoiding its obligation to pay benefits to plaintiff COSTELLO under the Supplementary Retirement Plan for executives.

XXIX

Commencing in approximately April, 1977, and continuing until her termination on or about January 6, 1978, defendant breached its covenant of good faith and fair

dealing with respect to plaintiff RITTER by harassing her and making false statements about her performance through her supervisor, by giving her until January 31, 1978, to improve but terminating her prior to that date, and by terminating her without complying with the requirements of the employment agreement, all with the object of preventing her from performing her duties and of forcing her to quit her employment in order to replace her with younger personnel, to reduce salary costs, and to avoid its obligation to pay benefits to plaintiff RITTER under the Supplementary Retirement Plan for executive employees. When plaintiff RITTER refused to quit her employment, defendant discharged her in breach of its implied covenant of good faith and fair dealing.

Appendix D-2

Excerpts From Plaintiffs' Pretrial Statement

c. *Substance Of The Action*

Cancellier, Costello and Ritter had lengths of service with I. Magnin ranging from approximately 25 years to 17 years at the time each was discharged in early, 1978. At the time of termination, each was an executive employee at Defendant's San Francisco location; each was over 50 years of age and each was satisfactorily performing his or her job responsibilities. All Plaintiffs, because of both their substantial years of service with the Company and their ages, were potentially eligible to receive extensive retirement benefits under the Defendant's supplementary retirement plan. Each Plaintiff was subject to executive personnel policies and appraisal procedures which required that they be terminated only if their performance was unsatisfactory and only if they had received a warning and ample opportunity to improve. The policies further preclude the taking of any employment action on the basis of age.

The Complaint raises three basic claims. First, all Plaintiffs contend that they were discriminated against on the basis of their ages and in furtherance of Defendant's goal to staff executive positions with younger individuals deemed promotable by the Company and costing the Defendant substantially less in salary and potential retirement benefits. All Plaintiffs claim that their discharges were also taken in furtherance of Defendant's goal to attract a youth market through staffing with younger personnel.

Cancellier, Costello and Ritter contend that they were terminated without regard to the personnel policies and appraisal procedures promulgated by Defendant to induce employees to remain with the Company. This claim is predicated upon the California legal doctrine that such

personnel policies create enforceable contractual obligations as well as give rise to an implied covenant of good faith and fair dealing.

• • •

d. *Undisputed Facts*

• • •

9. Defendant had certain personnel and appraisal procedures applicable to executive employees in effect at the time that each Plaintiff's employment was terminated. Those policies established procedures governing the manner in which employment could be terminated, required that involuntary terminations occur only for unsatisfactory work performance or other cause and mandated that all employment determinations be made without regard to an employee's age.

• • •

e. *Disputed Factual Issues*

1. Was Cancellier's age a determining factor in his discharge.

Defendant has posed as a disputed fact whether or not Cancellier was discharged, either constructively or directly, or whether he quit his employment after being told that his job was no longer available to him and after being offered two alternate job positions which were concededly demotions. Plaintiffs, however, do not believe that the fact of Cancellier's discharge can reasonably be viewed as a disputed one in light of admissions contained in Defendant's documents proving that Cancellier's termination was involuntary.

2. Was Costello's age a determining factor in his discharge.

3. Was Ritter's age a determining factor in her discharge.

4. Was Defendant's claimed reorganization of the Vice-President of Stores positions utilized as a pretext for terminating Cancellier due to his age.

5. Are the reasons now given by Defendant for its position that there were problems in the work performance of each of the Plaintiffs pretext for its determinations to terminate each Plaintiff due to his or her age.

6. Did Defendant have a policy of age discrimination and/or did Defendant practice a pattern of age discrimination.

7. Did Defendant violate its personnel policies and procedures and its appraisal procedures in terminating Cancellier even though his job performance was adequate and in the absence of any warning or opportunity to improve his work performance.

8. Did Defendant violate its personnel policies and procedures as well as its appraisal procedures in terminating Costello even though his job performance was adequate and in the absence of any warning or opportunity to improve his work performance.

9. Did Defendant violate its personnel policies and procedures as well as its appraisal procedures in terminating Ritter even though her job performance was adequate and without according the required warning or opportunity to improve her work performance.

10. Did Defendant violate its personnel policies in taking adverse employment action against each of the Plaintiffs on the basis of their ages.

Appendix D-3

Excerpts From Plaintiffs' Argument to the Jury

(R.T. 3967:2-3989:6; 4026:6-4028:17)

Ms. McClain: Ladies and gentlement of the jury, several weeks ago, you will recall that we started out talking about a framework that you would have in front of you as we reviewed the evidence in the case.

I'd like you to think back now with me to that framework that the plaintiff have shown by strong, convincing evidence of that framework on each of the claims the plaintiffs have presented to you.

I think you will see, as we go through the framework, that we discussed a long time ago, and piece with me the evidence, that they were wronged in precisely the manner in which they alleged they had been wronged.

You have one advantage the plaintiffs did not have when they commenced this lawsuit, and when they were in those painful, confusing days following their terminations after 25 years of employment, after 18 years of employment, after 17 years of employment: you have seen documents the plaintiffs did not know existed at the time of their termination. Those documents, in the defendant's own hand, prove, more loudly and more clearly than reams of testimony, what actually occurred in this case.

Let's look at each of those claims with particular concentration on those documents in the defendant's own hands.

Let's turn to the age claim first:

As you have heard, as we've progressed through this case, there is a Federal law prohibiting age discrimination. It prohibits the adverse employment action against an individual within the protected category because of that individual's age. Each of the plaintiffs before you are within the age categories protected by the Act.

Now, the Act is not limited to specific employment actions, such as discharge. It prohibits adversely affecting an employment of an individual because of that individual's age. You will hear during the instructions that such adverse action can include demotion.

• • •

The plaintiffs bear the burden, ladies and gentlemen, of showing you that it is more likely than not that their age was a cause of their discharge.

Let's look at the defendant's own documents when posing that inquiry: was age a cause of the defendant's—of the plaintiffs' discharge.

Let's start with plaintiff's Exhibit 1, and I think, as we follow through the documents that have been presented to you, we will see that there was a decade, at least, of age discrimination at Federated Department Stores, with particular applicability to I. Magnin.

• • •

There's one other concept that was explored in plaintiff's Exhibit 1, and I think continued throughout the decade. And that is this concept of promotability.

Once the defendant finds that an executive is old and non-promotable, regardless of how well that executive is doing, then, I submit the evidence shows that that executive is on his or her way out to make room for a younger, promotable individual, because that executive costs Federated Department Stores too much money, because that executive is just of little use, regardless of the years of service, regardless of how well that executive is doing.

• • •

Ladies and gentlemen, each of the plaintiffs in this action was stamped, was classified with his or her age. And that stamping, coupled with the determination that they were

no longer of use to the company, because they were not promotable, resulted in events leading inalterably to their discharges.

• • •

Mr. Cancellier was stamped in the beginning of 1977, when he was determined not to be promotable to a principal level. And, from that stamping, everything else followed.

Mr. Costello was stamped when he was determined to be good but career and not promotable beyond this level.

You will recall that, while Mr. Costello's supervisors said, "The jury is still out. I haven't determined how he's really performing in that job," in 1976, a search was already underway for Mr. Costello's replacement.

Job performance one way or the other was not important, ladies and gentlemen. What was important was that non-promotability.

Mrs. Ritter, too. "Never a DMM."

You recall those fateful words, written by Mr. Hughes, although you will also recall that he did not, to his current recollection, discuss "Never." He discussed every other matter in that note, except the "Never."

In any event, Mrs. Ritter was determined to be non-promotable, and, thereafter, her career took a decided turn for the worse.

Each of those plaintiffs were considered in conjunction with their age.

• • •

Let's talk about another side of an age claim, and that is a word called "pretext," ladies and gentlemen.

The Defendant can come forward, and will come forward, undoubtedly, and argue to you that there were reasons for what happened to each of these Plaintiffs.

You can look at those reasons, and it's within your province to say, they are so inconsistent as to be unbe-

lievable. They are incredible. Or they mask the Defendant's real motives. They aren't really what was going on.

Let's look at some of those reasons that were presented during the course of testimony from Mr. Cancellier, Mrs. Ritter, and Mr. Costello. And I think we will see that any consistency, nonsensicalness, run rampant throughout those reasons.

Let's start with Mr. Cancellier.

The inconsistencies regarding what happened to Mr. Cancellier among the chief decision makers at I. Magnin and Federated and stunning.

Mr. Hughes told you in lengthy testimony over and over again that the Company had no intention of terminating Mr. Cancellier in late 1977; they were just busily finding a place for him in the Company.

Mr. Anderson told you that, well, Federated did indeed write him a note saying Mr. Cancellier will be terminated on or about February 1. Terminated didn't mean fired. It meant terminated from that position.

The first example, ladies and gentlemen, of a series of incredible meanings applied to words by the defendants.

Mr. Wechsler told you in the last day of testimony that Mr. Anderson was indeed contemplating terminating Mr. Cancellier in 1977. Wouldn't you think if they had a real reason for doing something to Mr. Cancellier that they would have their stories straight on that issue?

Mr. Hughes said that Mr. Cancellier had an option of remaining in his current staff position. Mr. Anderson said that that option wasn't presented to him.

Ladies and gentlemen, what happened with respect to Mr. Cancellier is precisely what the documents say happened. And the proof of what happened to Mr. Cancellier is Mr. Hughes' note, "Position P.C. out in six months," written in September of 1977 following that determination

that Mr. Cancellier was non-promotable to a principal position. And anything that happened after that note, "Position P.C. out in six months," was pretext. It was set up. It was a mask to get rid of Mr. Cancellier in as painless a way as possible to the Company.

They may have been looking for a single head of stores on and off. Undoubtedly they were, but what happened in September of 1977 is that they saw a way to use that single head of stores search to ease Mr. Cancellier out of the Company. When they offered those two conceded demotions to Mr. Cancellier in 1978, Mr. Anderson told you that they were possibilities; that they were couched in vague terms.

Ladies and gentlemen, Mr. Hughes and Mr. Anderson did everything possible to convince Mr. Cancellier that those jobs weren't really there because they wanted him out. That is the meaning of "Position P.C. out in six months."

The pretext, ladies and gentlemen, continued to the trial of this matter. How many days were taken in telling you that Mr. Cancellier really quit, after all. He really meant to leave. It was a voluntary action.

Do you recall Mr. Taylor getting on the stand just days before this trial closed and telling you with a straight face that notwithstanding the fact that every single personnel document referred to the action severing Mr. Cancellier's employment as a termination, Mr. Cancellier quit. Ladies and gentlemen, that is a classic example of pretext.

What really happened is that Mr. Cancellier left. Mr. Neloms assumed his responsibilities, or to use Mr. Anderson's term, "substantially his responsibilities." And Mr. Chesler continued to do the same old thing. They may not have had ultimate responsibility. They may not have had a line going up to them on that organizational chart, but day to day those job functions continued to be performed because no single head of stores ever came upon the scene.

Look at their reasons give to you, ladies and gentlemen, for an adverse action affecting Mr. Cancellier's job with the Company after twenty-five years.

Mr. Wechsler told you that the biggest complainer about Mr. Cancellier was Mr. Wittick. Mr. Wittick told you that he had one five-minute conversation with Mr. Anderson and Mr. Hughes at Mr. Hughes' insistence during which he was asked whether there were any problems with Mr. Cancellier. What the defendant has presented to you as the reasons for getting rid of this employee after twenty-five years of employment is office gossip, ladies and gentlemen, and nothing more.

Let's turn to Mr. Costello. The inconsistencies and the pretext is just as clear in Mr. Costello's case. The defendant never did get it straight whether it was the numbers or some people problems that Mr. Costello was experiencing.

In 1977 Mr. Fox told you that Mr. Costello had some erratic behavior, but in the early part of the year his statistics were good. If you look at that review in the defendant's own handwriting, in their own personnel appraisal system, you will find that Mr. Costello received good grades for people relations and that his overall review was average to above average. Ladies and gentlemen, that is hardly the picture of someone who is in trouble. And it is hardly the picture of telling something that they are in trouble; average to above average.

What happened is that after that determination of nonpromotability, it didn't matter what Mr. Costello did. It didn't matter that his division was number one in the company in gross merchandise margin percent. It didn't matter that his sales and profits had consistently increased from the beginning of his taking over that divisional. It didn't matter that in the last year of his tenure as a divisional merchandise manager he was better than seven other divisions in sales growth.

What does the defendant tell you about all those figures? The defendant tells you that somehow they just weren't good enough. Ladies and gentlemen, those figures and the job evaluation done in April of 1977 of average to above average tell you in documents, in objective evidence, that Mr. Costello was indeed doing a very good job.

Let's take Mrs. Ritter. The pretext is glaring in Mrs. Ritter's case.

You heard witness after witness of the defendant tell you that people at I. Magnin swore. It is a tough business. Ladies and gentlemen.

In December of 1976, after probably swearing for seventeen years, Mrs. Ritter was summoned in to Mr. Benham and Mr. Hughes' presence, given a sheaf of papers involving two instances, the Amanda Burton incident and some other incident, and told that she had better start getting along with Mr. Benham. The defendant tells you that that was a warning meeting. Mrs. Ritter told you that it was a discussion to see how things could be resolved.

Let's take the defendant's view for a moment, that of a warning meeting.

Let's assume that Mrs. Ritter was given a warning on profanity in December of 1976. Ladies and gentlemen, that warning fulfilled its purpose. Mr. Benham told you in his testimony that no further instances occurred. You warn somebody; they do what you tell them to do and then what happens? You have to find another reason for your plan to get rid of the individual.

There is one other instance of profanity that has been presented to you after the December 1976 flurry of documentation, and that is Mrs. Dirks. Do you recall Mrs. Dirks?

Mrs. Dirks couldn't remember in her deposition whether or not swearing even occurred. All she remembered was there was some kind of a scene in Phoenix. She couldn't

even remember when it occurred. Her recollection was miraculously refreshed on the stand and she said upon reflecting she thought perhaps the word "shit" had been used.

Ladies and gentlemen, Mrs. Dirks didn't recall what the underlying incident was, and nobody else recalled much about what happened. If you look at the testimony of defendant's witnesses, you will find it is riddled with inconsistency about that Dirks instance.

Mrs. Dirks said that she talked to Mr. Somers, Mr. Anderson and Mr. Chesler about this terrible thing that had befallen her. Mr. Anderson said he never talked to Mrs. Dirks. Mr. Hughes talked to Mrs. Dirks. Mr. Wechsler said he did talk to Mrs. Dirks. Mr. Somers in his deposition said he didn't talk to Mrs. Dirks, but on the stand testifying before you he said he did talk to Mrs. Dirks.

Now, the reason for those inconsistencies is because nothing of importance happened in Phoenix in 1977. Nobody could remember what occurred. But it was something that could be used in the final analysis to get rid of a buyer who had been there for eighteen long dedicated years of employment.

What happened when Mrs. Ritter cleaned up the profanity when she went along with the warning that Mr. Benham gave her in 1976?

Mr. Benham was directed by Mr. Hughes to get objective performance documents. Do you recall Mr. Benham's objective performance documents? Do you recall the review he performed in March of 1977 where notwithstanding the fact that 20 out of 23 categories were average or above average, the overall summary was checked between average and below average.

Do you recall his testimony that the Sherman business that Mrs. Ritter was developing in 1977 shouldn't be counted in her figures? "Just leave that out, because she didn't have

that in 1975. Never mind that. A bunch of other things were taken away and no longer her responsibility then. Let's take out the Sherman figures anyway."

If you put the Sherman figures back in and you find that during that last review preceding Mrs. Ritter's termination she did better than her division in gross merchandise margin percent, in sales growth, and in profit growth.

Where did Mr. Benham get lagging behind the division? You heard Mr. Foo, defendant's own witness—one of defendant's own witnesses say that, indeed, if you looked at the figures and you compared what actually happened with what actually happened, it would appear the division was lagging behind Mrs. Ritter. What happened at the end of 1977 to Mrs. Ritter? Another flurry of activity about order writing, some comments about mail order catalogs, when you have seen, ladies and gentlemen, over and over again that Mrs. Ritter had the best performance in each of those mail order catalogs.

And then there was something about Kimberly. Do you recall that? Kimberly people were complaining in new York. There were difficulties with Kimberly orders.

Kimberly went out of business, ladies and gentlemen, in 1978. There probably was difficulty with Kimberly's orders.

And then there was a Stanley Sherman complaint, some discussions with Mr. Sherman.

This is a volatile business, ladies and gentlemen. Mr. Sherman didn't tell you what happened. You got the defendant's interpretation of what happened.

In any event, it is a volatile business where people talk, where people gossip, and that is what you got from Mrs. Ritter's termination as well. Gossip.

Let's turn to the second claim presented by each of the plaintiffs in this matter, and that is a claim that their contractual relationship with I. Magnin has been breached in their discharges.

Ladies and gentlemen, each of these plaintiffs had a long standing employment relationship with I. Magnin. They were employed for years and years and years with good evaluations on I. Magnin's own personnel policies.

You heard Mr. Hughes talk about the performance appraisal system and about the termination policies. You heard what he said about the reasons for those documents being in effect. They are distributed to employees, ladies and gentlemen, because they are a benefit to both the company and the employee. The company gets an employee who remains, who builds up experience over the years, and the employee gets a sense of security, a sense of knowing that he or she will not be terminated unless he or she receives fair warning; unless he or she receives a fair evaluation of work performance; unless he or she is given an opportunity to improve.

With respect to each of these plaintiffs, ladies and gentlemen, the defendant made a mockery out of its performance appraisals and its policies and procedures which it intended the employees to rely upon. Each one of them was evaluated as being a good employee. Each one of them did not know that there was anything affecting his or her employment status, because the boxes checked on that performance appraisal told them that they were doing a good to better than good job.

There is a third claim that each of the plaintiffs raise in this action, and that is a claim of an implied covenant of good faith and fair dealing.

Because of their long-standing relationship, ladies and gentlemen, and because the defendant recognized obligations to these employees in the forms of those personnel policies, it had an obligation to deal fairly with them, to treat them honestly and above board and with direct approach.

We don't need to go over the pretext again to detail those facts. But it is clear, ladies and gentlemen, is it not, that each of these plaintiffs was dealt with in a malicious, in an unfeeling, in a manner that didn't recognize their service to the company.

• • •

Ms. Mc Clain: Ladies and gentlemen, there have been exactly some five weeks of trial. Have you yet to hear an explanation for the constant reference to age throughout the defendant's documents? Have you yet to hear a consistent explanation as to why the plaintiffs were terminated, other than the defendant thought it was a good idea, and it's within the defendant's business judgment to make those kind of conclusions?

Defendant has told you there is a straw upon which plaintiffs rest their case of age discrimination, and that straw is plaintiff's Exhibit 1.

Ladies and gentlemen, plaintiff's Exhibit 1 is the start of document after document after document commenting upon age in the context of personnel decisions. Not a fact of life, ladies and gentlemen, that needs to be looked at.

It was a fact of life at I. Magnin that, in every area of employment determinations, age was considered.

• • •

Ladies and gentlemen, every key executive at I. Magnin was classified by his or her age, and that chart was used in personnel decision-making.

Age was indeed a fact of life at I. Magnin. It was the basis for employment determinations.

Pick up plaintiff's Exhibit 11 and leaf through letters from business careers. You will find, time and time again, the youth of employees is referred to.

Look at Mr. Anderson's speech. Look at what happened

over those years and ask yourself whether age was a factor that was ignored by I. Magnin, or whether indeed—

Mr. Connors: If your honor please, I did not refer to business careers. I thought this was rebuttal and not new argument.

The Court: Well, it is rebuttal, but I think it's within the scope of rebuttal, Mr. Connors. I will allow it.

Mr. Connors: All right.

Ms. Mc Clain: —or whether indeed age was the overall consideration for employment determinations. • • •

Appendix E-1

Statement of Facts in Plaintiffs' Opening Brief (Pages 3-23)

B. Statement Of Facts Relevant To The Issues Presented For Review

Two facets of the trial record demonstrate Plaintiffs' entitlement to injunctive relief and reinstatement: Federated's age discrimination policy and the employment histories of Cancellier, Costello and Ritter. Each facet will be examined in this section of the brief, an examination which will demonstrate that the Plaintiffs will not be made whole and the purposes of the ADEA will not be effectuated until these three individuals are returned to work at I. Magnin and the Company is told to cease its discriminatory policy and practices.

1. Federated's Policy Of Age Discrimination At I. Magnin

An examination of the 1970's demonstrates Defendant's consistent pronouncement and application of age discrimination in employment policies and decisions. Often, age discrimination was correlated with the I. Magnin goal to attract a "youth market" and its desire to lower the median age of executive employees through the replacement of older, capable employees who were deemed to have reached their career positions with "bright," "young," "aggressive" individual.

Ross Anderson, I. Magnin Chief Executive Officer from 1972 through 1979, testified that the development of a youth market was a "consistent objective" for many years (RT, Trial Transcript, Vol. 20, pp. 3349, 3374, 3440-3441). Former I. Magnin Divisional Merchandise Manager Eric Steiner testified: "One of the main concerns we had as management was that we were not attracting young customers into the

store." (RT, Trial Transcript, Vol. 15, p. 2402). Because of that concern and at the request of upper I. Magnin management, Steiner prepared, in the Fall of 1969, a document analyzing staffing needs of certain departments selling goods bought by Ms. Ritter (*Id.*, pp. 2390-2391, 2402). That report contained such conclusions as:

> We need an influx of new, younger-thinking people who can merchandise and sell in tune with the 70's.
>
> Here, also, we need that 'ageless' salesperson of 30 to 45, who relates more effectively to both customer and merchandise.
>
> San Francisco particularly has too many superannuated salespeople. This could and should be a much younger department in both setting and selling.

(Plaintiffs' Trial Exhibit No. 46, pp. 10, 12 and 19).

In a five, and in part ten, year projection of I. Magnin's business and personnel needs prepared in 1970 and entitled "Organization and Key Manpower Plan (1970-1975)," Federated reiterated its merchandising goal to "project a more modern appeal to the youth market" (Plaintiffs' Trial Exhibit 1, p. 7820).

Once again, the age of I. Magnin employees was related to the goal of achieving appeal to a youth market. In a section of the report analyzing executive personnel, Federated compared in graph form the median age of I. Magnin key executives with that of other divisions and noted that the I. Magnin median age of 48 was "substantially higher than the Federated median". The report documented Federated's concern that with such age grouping I. Magnin could not accomplish its merchandising goals and suggested a solution to the problem. The corporate report reads:

> A more subtle question relates to the implications of this age distribution upon Magnin's goal to have increasing impact in the youth market. An aging study

> of the rest of Magnin's management might disclose *the need for the planned introduction of younger personnel*—particularly in the merchandising and sales areas.

(Plaintiffs' Trial Exhibit 1, pp. 7834-7835 [emphasis added]).

The 1970-1975 Organization and Key Manpower Plan presented other themes concerning executive personnel decisions which were to be reiterated by I. Magnin throughout the decade. The report, for example, phrased a concern that the retirement benefits might not be adequate for such a "relatively high age grouping," commented that I. Magnin had a small number of "promotable" key executives and expressed a need to identify "high potential talent" as back-up candidates for key executives (*Id.*, p. 7835). The Federated report contains other references to an individual's age, at times correlated with an assessment of the individual's future potential. About executive Loma Petersen, for example, it was written, "Because of age (59), she has, of course, reached her potential" (*Id.*, p. 7935).

Throughout the decade, Federated and I. Magnin managers emphasized age in hiring and recruitment. For ten years, Federated officials in charge of executive placement utilized a form entitled "Personnel Specification Sheet" for recording information about a vacant executive position. The form contained seven categories, admitted by Federated Vice-President J. L. Tonner to be the "most important aspects" of information needed to conduct an executive search. The categories were: position title, date required, salary range, responsibilities, to whom the position reported, background and "desirable age" (Plaintiffs'

Trial Exhibit 7; RT, Trial Transcript, Vol. 15, pp. 2430-2431).[4]

During the 1970's, both I. Magnin and other Federated divisions utilized a New York firm known as "Business Careers" for executive recruitment. Samples of correspondence between I. Magnin executives and Business Careers personnel were introduced at trial. The correspondence shows a consistent, repeated emphasis upon the youth, ambition and growth potential of candidates for hire (Plaintiffs' Trial Exhibit 11). Excerpts from the I. Magnin-Business Careers correspondence are:

> Russell is a bright, young man who is supposed to be one of the comers in the business.
>
> (Letter from Business Careers President Mines to the then Vice President of Personnel at I. Magnin, Charles Gray, dated June 13, 1974).
>
> This [Bruce Downard] is an exceptionally bright, personable, ambitious young man with tremendous advancement potential.
>
> (Letter from Business Careers Senior Vice President Leo Brody to Charles Gray dated July 11, 1974).
>
> He [Aguiar] is a most unusual man. Young, bright, definitely a comer, . . .
>
> (Letter from Mines to Charles Gray dated July 26, 1974).
>
> . . . Blair is a talented and aggressive young man . . .
>
> (June 6, 1975 letter from Business Careers to John Schumacher, then President of I. Magnin).
>
> Rest assured, Mr. Hughes, that we shall continue to recommend to you outstanding young men with Fashion Management experience as we have in the past.

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4. The Personnel Specification Sheet was changed two months before trial in this matter to delete the category "desirable age" (*Id.*, p. 2430).

(Letter from Business Careers Vice President Brody to William Hughes, then Vice President of Personnel at I. Magnin dated July 28, 1975).

John is a 'young man on the move' and potentially senior management material.

(Letter from Brody to Hughes dated November 9, 1977).

(Plaintiffs' Trial Exhibit 11).

Plaintiffs' Trial Exhibit 11, containing over 100 pages of references to "young" candidates for executive positions is perhaps best summarized in the July 22, 1974 letter written from then Vice President of Personnel for I. Magnin, Charles W. Gray, to Barbara Cohen, Placement Manager for Business Careers, in which Gray accepts Cohen's invitation to talk to a potential candidate with the following words: "We have nothing specific to talk about, but want to meet all the *bright, young ones* that we can." (Plaintiffs' Trial Exhibit 11; emphasis added).

In the first half of the decade, I. Magnin implemented its "planned introduction of younger personnel" in the sales and merchandising areas, an implementation admitted by Chief Executive Officer Ross Anderson at trial (RT, Trial Transcript, Vol. 20, pp. 3440-3441). Young employees were hired to sell to young customers; older employees were, acording to Anderson, "transferred" (*Id.*, p. 3441). Older employees were derided by I. Magnin management. Neal Fox, John Costello's immediate supervisor at the time of Costello's termination, labeled a 50-year old shoe buyer "an old shoe dog" and referred to a handbag buyer in her early 50's as "menopausal" and as buying handbags which

"looked as old as she did" (RT, Trial Transcript, Vol. 7, pp. 845-848).[5]

Lydia Dresnek, a co-buyer in Plaintiff Zelma Smith's division during the early 1970's, attested to a September 1973 conversation with her Divisional Merchandise Manager, David Mosson, during which Mosson called his buyers "old biddies," announced that "management wants to get rid of the old biddies" and concluded that "new blood" was needed. Even though Mosson reassured Dresnek, who was 45 at the time of the conversation, that her tanned, young look would protect her, approximately two years later Dresnek resigned because of the conversation and what she felt was "branding" on the basis of age (RT, Trial Transcript, Vol. 11, pp. 1616-1621).[6]

By October 1975 Ross Anderson was able to announce to the Federated Board of Directors, in a speech and slide program, that I. Magnin had made progress in attracting a youth market and in staffing with the young. Anderson's presentation contained the following description of I. Magnin junior departments:

> Here is our *Junior* presentation: The Young Delivery Service. Denims by JAG. Every bright, fresh, new look for the young, the fashion informed. *Staffed by the young, the fashion informed.* Young, bright, bouncy yes.

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5. An order taken by Business Careers in May, 1975 sought a "young and promotable lady" for a casual handbag position (Plaintiffs' Trial Exhibit 11, order dated 5/29/75).

6. At the time the conversation with Mosson occurred, the six buyers in Dresnek and Smith's division were between the ages of the mid-40's and late 50's. By the time Dresnek left, three of the six were no longer with I. Magnin and had been replaced by persons in their late 20's and early 30's (*Id.*, pp. 1621-1623). At the time of her discharge in early 1978, Zelma Smith Ritter was from ten to twenty years older than other buyers in her division (RT, Trial Transcript, Vol. 5. pp. 532-533).

(RT, Trial Transcript, Vol. 4, pp. 322-325; Plaintiffs' Exhibit 34, pp. 2-3; [emphasis added]).

In the latter half of the decade, Federated turned its attention to three problems first delineated in the 1970-1975 Organization and Key Manpower Plan: the high median age of I. Magnin executives, the small number of promotable executives and the need to identify backup candidates for executive positions. In August 1976 Federated implemented a systematic study of such problems in the form of the Human Assets Inventory, a review of executives performed on two documents, an organizational chart and a summary of performance, potential and readiness (Plaintiffs' Trial Exhibits 14-18).[7]

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7. The Human Assets Inventory encompassed an analysis of those persons in key executive positions, including Divisional Merchandise Managers and Vice Presidents. I. Magnin personnel officials developed a conceptually similar device for the review of Buyers (RT, Trial Transcript, Vol. 2, pp. 65-66).

Human Assets Inventory reviews of I. Magnin key executives were completed by William Hughes, the Vice President or Senior Vice President of Personnel from July 1975 through April 1978, approved by Chief Executive Officer Ross Anderson and forwarded under the label "highly confidential" to Federated officials (RT, Trial Transcript, Vol. 2, pp. 57-58, 66-69). Each executive was evaluated in accordance with performance levels and promotional potential and placed on an overall organization chart.

The organization chart, characterized by Bernard Klayf, Federated Executive Vice-President, as "useful" in "succession planning," contained all relevant information to the Federated decision-making process: the individual's position, length of service, salary, the time in the position and, in the upper left-hand corner of each block, the employee's

age (RT, Trial Transcript, Vol. 16, pp. 2553, 2608-2609; Plaintiffs' Trial Exhibits 17 and 18).

Philip Cancellier's block on the Human Assets Inventory organization chart prepared in March 1977, a year before his termination, illustrates the succession planning implemented through this system. The block shows Cancellier's position of Vice President-Stores, his unbroken length of service of 17 years, his salary level of $70,000 and his age in 1977, 50. One of the individuals identified as a high potential backup for Cancellier's position, Henry Neloms, then age 43, in fact substantially assumed Cancellier's job duties in mid-1978 (Plaintiffs' Trial Exhibit 17; RT, Trial Transcript, Vol. 20, p. 3379).[8]

2. The Plaintiffs' Work Histories; The Application Of Federated's Age Discrimination Policy To Them And To Others

a. *Philip Cancellier*

Philip Cancellier commenced working for I. Magnin in 1953 at age 26; he was terminated effective May 1, 1978 at age 51. Except for an approximate six-month break in service in 1959, he was employed by I. Magnin for 25 years, working his way up from a Department Manager position

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8. Ages were placed on the Human Assets Organization Charts at the specific request of Federated (RT, Trial Transcript, Vol. 2, p. 75). When asked to explain the presence of executives' ages, Personnel Vice President Hughes testified that the Federated purpose was to "flag retirements and determine retirees' replacements." When asked how that explained the notation of ages in the 30's, 40's and 50's, Hughes stated "if you're going to put the age on there, you probably would put it in every box" (*Id.*, pp. 75-76). An examination of Plaintiffs' Trial Exhibits 17 and 18 discloses that of the approximate 60 persons identified on Plaintiffs' Trial Exhibit 17, 4 were in their 60's at the time the chart was prepared; only 2 of the 28 persons on Plaintiffs' Trial Exhibit 18 were in their 60's in 1977.

to Vice President-Stores/Operations, with overall operating responsibility for some 22 I. Magnin locations throughout the United States. Throughout his career, Cancellier gained wide exposure to both merchandising and operating aspects of retailing in positions ranging from Assistant Buyer, Buyer, Store Manager, Divisional Merchandise Manager to the Vice President posts held during the last 10 years of his career (RT, Trial Transcript, Vol. 3, pp. 242-258).

During his career with I. Magnin, Cancellier was consistently evaluated as a strong, aggressive executive who "got the job done". In the Organization and Key Manpower Plan prepared in 1970, Cancellier, then in his early 40's, was evaluated as a "fine young man—good for I. Magnin-Federated. Will be encouraged." and was labeled "energetic, a doer" (Plaintiffs' Trial Exhibit 1, p. 7851). During the last five years of his employment, Cancellier was evaluated by Ross Anderson, one of the individuals responsible for the decision to terminate Cancellier in early 1978 (Answer to Interrogatory No. 1, Plaintiffs', Trial Exhibit 57). Anderson rated Cancellier as good to excellent in performance appraisals completed in each of the four years preceding his termination (Plaintiffs' Trial Exhibits 30-33). In April 1973, Cancellier received an overall rating of good and was called "aggressive and dedicated to his job" (Plaintiffs' Trial Exhibit 30). In 1974, Cancellier was rated as excellent and labeled by Anderson "a bull-dog in pursuit in the operating elements of his job". In a review performed in early 1976, Cancellier received an overall rating of above average with the comment "a dedicated and able executive". In the last evaluation performed before his termination, Cancellier received an overall rating of between average and above average (Plaintiffs' Trial Exhibit 33).

Unbeknownst to Cancellier and completely apart from the written appraisal system performed on an annual basis, Cancellier was also a subject of the Human Assets Inventory. In the first such review dated September 30, 1976, Cancellier's performance was rated in the upper 25% or "very good"; he was evaluated as "promotable" within three years (Plaintiffs' Trial Exhibit 4, p. 7843; Plaintiffs' Trial Exhibit 14, p. 7287). In a span of just six months, questions were raised as to whether Cancellier's performance should be evaluated on the Human Assets Inventory as "very good" or "satisfactory to good" with the apparent only difference being a February 1977 decision that Cancellier was no longer deemed promotable to a principal position (Plaintiffs' Trial Exhibits 15 and 16).

Cancellier's termination was foreshadowed in a March 31, 1977 Federated memorandum stating that he was "no longer seen as a potential principal" and further noting that Henry Neloms, the 33-year-old individual who eventually took over Cancellier's duties, was "considered a replacement for Cancellier" (Plaintiffs' Trial Exhibit 5). On September 9, 1977, Hughes met with Ross Anderson to discuss various personnel matters. His notes of that meeting contain the following phrase about Cancellier and Neloms: "Will position P.C.—out in 6 mo. . . . Hank to second spot in stores." (RT, Trial Transcript, Vol. 2, pp. 133-140; Plaintiffs' Trial Exhibit 19).[9]

On January 3, 1978, Personnel Vice President Hughes, Chief Executive Officer Anderson and President Norman

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9. Describing himself as an "avid notetaker," Hughes testified that he routinely and regularly took notes of meetings concerning personnel determinations for the purpose, among others, of carrying out his job responsibilities (RT, Trial Transcript, Vol. 17, p. 2757). According to the testimony of I. Magnin President Norman Weehsler, "Mr. Hughes took notes at every meeting. He's a historian." (RT, Trial Transcript, Vol. 21, p. 3811).

Wechsler met. Hughes' notes from that meeting contain the following comments about Mr. Cancellier's future with the Company: "Phil C.—not a principal—dead end here . . . Age 50. Maximum potential!" (RT, Trial Transcript Vol. 2, pp. 142-143; Plaintiffs' Exhibit 20).

On January 5, 1978, Cancellier, for the first time, became aware of the decision to terminate his employment. Without warning, he was told by Ross Anderson that he was no longer considered for a Federated principal position, he could no longer continue to perform his responsibilities, he could possibly request one of two alternate positions, both of which were demotions and neither of which were then available, or he could leave the Company (RT, Trial Transcript, Vol. 2, p. 142; Vol. 4, pp. 284-288; Vol. 19, pp. 3149-3156; Vol. 21, p. 3796). Telling his supervisors that he was being offered only one real alternative, that of "leaving" the Company, Cancellier ceased working for I. Magnin effective May 1, 1978 (RT, Trial Transcript, Vol. 4, pp. 300-301). In June 1978 Norman Chesler, then an I. Magnin Vice President, related to Cancellier President Wechsler's statement regarding why Cancellier was terminated. Wechsler was quoted by Chesler as saying: "The people at Federated wanted them to get a lot of young people around here and he [Wechsler] was sorry he [Cancellier] was no longer there." (RT, Trial Transcript, Vol. 4, p. 329).[10]

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10. Chesler, who was still a Vice President at I. Magnin at the time of trial in this matter, testified regarding his version of the conversation with Wechsler. Chesler admitted that the conversation concerned Cancellier's leaving the Company and quoted Wechsler as saying "we've got to get some young blood in here and I guess we all have to go along one of these days" (RT, Trial Transcript, Vol. 19, pp. 3311-3312).

b. *John Costello*

John Costello, who started with I. Magnin in 1961 as an Executive Trainee, held the position of Divisional Merchandise Manager, Division V (Accessories), at the time of his termination on May 1, 1978 at age 54 (RT, Trial Transcript, Vol. 7, pp. 759-763).

From September 1975 when Costello assumed responsibility for Division V, through 1977, the last full year of Costello's employment, Division V, either singly or in a tie with one other division, led all other I. Magnin divisions in the area of gross merchandise margin percent, a measurement of the percent of profits to dollars (RT, Trial Transcript, Vol. 13, pp. 1875-1876; Plaintiffs' Trial Exhibits 39-A through 39-D). Costello consistently increased the sales of Division V each year, starting from slightly over $12 million in 1975 to approximately $14.4 million at the end of 1977 (Plaintiffs' Trial Exhibit 39-I).

From 1976 to 1977, Division V experienced a 12.1% increase in sales growth; Costello outproduced seven of the eleven divisions in this figure the year preceding his termination (RT, Trial Transcript, Vol. 7, pp. 834-835; Vol. 13, pp. 1916-1917). Division V also exhibited consistent growth in the area of gross merchandise margin profit dollars, the dollars available to run the business (RT, Trial Transcript, Vol. 13, p. 1875). In the year preceding Costello's termination, Division V experienced a 9.89% increase in gross merchandise profit dollars over 1976; a figure that was average when compared to the performance of other divisions during that same period (*Id.*, p. 1919). In sum, in every year in which Costello was responsible for Division V, he increased sales and profit; in each year Division V

led the Company in gross merchandise margin percent (RT, Trial Transcript, Vol. 13, pp. 1915-1921).[11]

John Costello received two written appraisals of his performance as the Accessories Divisional; both rated his overall performance as between average and above average, defined by I. Magnin's employment policies as meeting "minimum requirements of position-adequate" [average] and meeting "requirements of position without weakness" [above average] (Plaintiffs' Trial Exhibits 36 and 37). Indeed, written personnel policies generated by Vice President Hughes to provide a "meaningful executive appraisal system" specifically stated that personnel rated as average were not "to be considered in any way as marginal performers" (Plaintiffs' Trial Exhibit 13, pp. 413 and 415).[12]

John Costello, like Philip Cancellier, was labeled non-promotable, a characterization appearing in a January 1976 Federated memorandum stating *"John Costello"* "good but career in this level" with "career" being a phrase used to denote non-promotability in the Human Assets Inventory scheme (Plaintiffs' Trial Exhibit 2; Plaintiffs' Trial Exhibit 14, p. 7287). As early as September 1976, when concededly no decision had been reached that Costello was not capably performing his Divisional position, I. Magnin was searching for a replacement (RT, Trial Transcript, Vol. 20, pp. 3533-

11. The first time that Division V experienced slippage from its number one place among all divisions in the category of gross merchandise margin percent was in 1978, a pattern which continued in 1979 with one-half of 1978 and all of 1979 being the responsibility of Costello's replacement, Joyce Coddington-Harrington, whose age was defined by Costello's supervisor, Neal Fox, as "on the sunny side of 40" (RT, Trial Transcript, Vol. 10, pp. 1308-1309).

12. A third, undated appraisal was prepared only after the decision to discharge Costello had been reached and was first seen by Costello in conjunction with a review of his personnel file undertaken at the time of termination (Plaintiffs' Trial Exhibit 38; RT, Trial Transcript, Vol. 7, pp. 812-813).

3534; Plaintiffs' Trial Exhibit 3). The only determination which had been reached about Costello at that time was that he was "not promotable" (Plaintiffs' Trial Exhibit 22, p. 7840).

In April 1977 Fox, Anderson, Wechsler and Hughes discussed Divisional Merchandise Managers. It was decided to remove Costello from his position; Hughes' notes of that meeting contain a reference to Costello's age. The notation of the discussion on Costello starts "Costello 53→ "; the reference being to Costello's age and characterized by Hughes at trial as a "doodle" (RT, Trial Transcript, Vol. 2, pp. 156-167; Plaintiff's Trial Exhibit 23).

Hughes' notes of the April 1977 discussion also record a plan of withholding from Costello the knowledge that he was to be removed from the Divisional job because of I. Magnin's concerns that Costello might precipitiously leave the position before a replacement had been found. The plan was to tell Costello about the availability of a new position in the I. Magnin hierarchy, a position which Defendant's officials knew would be filled by another individual (RT, Trial Transcript, Vol. 2, pp. 168-170; Vol. 7, pp. 790-792; Vol. 21, pp. 3774-3775). Hughes' note reads: " — hint at future—but don't tell yet. 'We need replacement first'—if pressed — we have another job same level." (Plaintiffs' Trial Exhibit 23).

In late January 1978 and only because Costello presented an income verification form for a bank loan did I. Magnin officials tell Costello of their April 1977 decision to terminate him (RT, Trial Transcript, Vol. 2, pp. 175-176; Vol. 7, pp. 803-805).

c. *Zelma Smith Ritter*

Zelma Smith Ritter had worked for I. Magnin over 18 years at the time of her termination on January 6, 1978 at

age 52. Starting as a Salesperson, Ritter became an Assistant Buyer and thereafter a Buyer of coats and suits, an area in which Ritter specialized throughout her career (RT, Trial Transcript, Vol. 5, pp. 461-462).

From 1973 through 1976, and despite several changes in her buying responsibilities, Ritter consistently improved her departments' performance in sales and gross margin dollars. Ritter's sales volume in 1973 was approximately $1.96 million; in 1976 sales had increased to approximately $3.6 million. In the area of gross margin dollars, Ritter improved from a 1973 figure of approximately $860,000 to a 1976 figure of $1.58 million (RT, Trial Transcript, Vol. 5, pp. 512-520; Plaintiffs' Trial Exhibits 42-A and 42-B).

In 1977, Ritter was transferred from Division III to Division II with a change from responsibility over five departments (three for one-half year) in 1976 to responsibility for only three departments in 1977. The realignment allowed more concentration on the development of business for Stanley Sherman goods (RT, Trial Transcript, Vol. 5, pp. 546-547). With less volume, Ritter managed to keep her sales and gross margin dollars relatively stable in 1976 and 1977; if comparative figures are utilized, Ritter experienced a 7.7% growth in sales during the year preceding her termination and a 9.1% increase in gross margin dollars (RT, Trial Transcript, Vol. 5, pp. 547-549; Plaintiffs' Trial Exhibits 42-A and 42-B).

In early 1977, Ritter was evaluated by her then supervisor, Robert Benham, as having an 8% net sales increase in 1976 over 1975 (Plaintiffs' Trial Exhibit 41, p. 129; RT, Trial Transcript, Vol. 16, pp. 2528-2529). The 8% increase in net sales was almost double that experienced by Ms. Ritter's division as a whole, which showed only a 4.7% increase in that area (*Id.*, pp. 2528, 2532-2533). Again,

comparing 1976 to 1975, Ritter outstripped her division in the area of gross merchandise margin dollars with Ritter's departments showing an increase of 5.6% and the division having an increase of only 2.6% (*Id.*, pp. 2532-2534). In the area of gross merchandise margin percent, the division experienced a decline which was greater than that of Ms. Ritter's departments (*Id.*, pp. 2535-2537). Ritter out produced the division in each measure of performance even though her responsibilities were reduced in 1976 (*Id.*, pp. 2531-2532).

In 1975, Ritter produced 15% of the total division's sales, a figure increased to 16.2% in 1976. In 1977, the last year of her employment, Ritter contributed 20.4% of her division's sales even though she was only one of nine Buyers, a percentage contribution almost double that which would be expected of equally proportionate contributions from all Buyers (RT, Trial Transcript, Vol. 5, pp. 549-550). A major portion of Ritter's responsibilities during the year preceding her termination was the development of the Stanley Sherman business; that development was additionally an objective of Ritter's immediate supervisor, Divisional Alvin Somers. Following Ritter's termination, Somers and his division were praised in a written performance evaluation for having attained the goal of developing a strong Stanley Sherman business (RT, Trial Transcript, Vol. 15, pp. 2348-2354).

In a written performance appraisal dated April 5, 1976, Benham evaluated Ritter's performance as above average and wrote, "a strong experienced buyer in an otherwise green division" (Defendant's Trial Exhibit ZSR-4). Shortly after that evaluation, Zelma Ritter, like her co-Plaintiffs, was labeled "non-promotable". Hughes' notes of a meeting

with Anderson and Wechsler held on April 16, 1976 record the conclusion that Ritter would not be promoted to a Divisional position with the words "never as a DMM" (RT, Trial Transcript, Vol. 3, pp. 186-189; Plaintiffs' Exhibit 25). The I. Magnin officials also discussed that two Buyers would be required to replace Ritter. Finally, Hughes' notations indicate a concern with Ritter's salary level; the note states: "Must level w/her.! Re: comp and position ✓ ✓ slow or no later increases." (RT, Trial Transcript, Vol. 3, pp. 187-188, 191; Plaintiffs' Exhibit 25).

In December 1976, following the determination of non-promotability, Benham prepared a memo criticizing Ritter for the use of profanity and emotionalism (RT, Trial Transcript, Vol. 16, p. 2487).[13]

As in the case of her co-Plaintiffs, a Hughes document exists showing notation of Ritter's age in conjunction with a discussion of her future employment with I. Magnin. On December 22, 1976, a Hughes memorandum of a conversation with Benham regarding Ritter states "Discussed need for objective performance documents."; that notation is accompanied by a calculation of Ritter's age and length of service (RT, Trial Transcript, Vol. 3, pp. 202-203; Plaintiffs' Trial Exhibit 26).

Following the Hughes-Benham discussion of the need for "objective performance documents," Benham prepared the last review received by Ritter prior to her discharge. That review, dated March 15, 1977, gave Ritter an overall rating of between average and below average even though

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13. Testimony from Defendant's own witnesses established that retailing is a tough, aggressive business (RT, Trial Transcript, Vol. 16, p. 2518). Thirty-nine year old Store Manager, Lucy Zahran conceded at trial that she had sworn and lost her temper while on I. Magnin business but had never been criticized for either action by her employer (RT, Trial Transcript, Vol. 17, pp. 2917-2918).

Ritter received an average, above average or excellent rating in 20 of the 23 categories set forth in the review (Plaintiffs' Trial Exhibit 41). That review also speaks of Ritter's "lagging behind the division" even though Ritter surpassed the division in each of the three categories measuring merchandise performance (*Id.*, p. 127; see discussion, *supra*, pp. 18-19).

In February 1977 Ritter was transferred to Somers' division; within weeks of that transfer, Somers began to criticize Ritter for the manner in which she performed the routine aspects of her job and commenced a course of harassment, including shouting and calling her "stupid," that was to continue until the time of her discharge (RT, Trial Transcript, Vol. 5, pp. 528-540). In October and December, 1977, both Somers and Hughes again asked Ritter whether she would resign; when she refused, she was discharged effective January 6, 1978 (RT, Trial Transcript, Vol. 6, pp. 556-558). She was replaced by three younger buyers (RT, Trial Transcript, Vol. 10, pp. 1309-1310).

d. *Other Similarly-Situated Executives*

In 1976, the year the Human Assets Inventory was introduced, Federated also instituted the Supplementary Retirement Plan under which an executive, making at least $30,000 per year, could qualify to receive additional retirement benefits guaranteeing a payment level of at least 40% of the individual's salary, defined as the average of the three highest years of compensation in the five years preceding retirement. The plan was unfunded; there were both length of service and age requirements for qualification. Those executive employees earning at least $30,000

per year who had both long tenure and higher age were thus potential recipients of the 40% guarantee (Plaintiffs' Trial Exhibits 28 and 29).

From the inception of the plan to the time of trial, only three individuals had ever qualified for receipt of supplementary retirement benefits (RT, Trial Transcript, Vol. 12, pp. 1737-1738). In a statistical analysis of the involuntary terminations occurring during the period 1976 through 1979 among persons in Plaintiffs' age group potentially qualified to receive the supplementary benefits because they were executives earning at least $30,000 per year, it was found that the likelihood of such terminations occurring by chance was less than 1 in 100 (RT, Trial Transcript, Vol. 10, pp. 1385-1386).

Each Plaintiff's length of service and age were considered in conjunction with the decision to terminate employment. In the December 1976 Hughes note containing a calculation of Ritter's age, there also appears a calculation of Ritter's length of service (Plaintiffs' Trial Exhibit 26, RT, Trial Transcript, Vol. 3, p. 203). In the April 1977 Hughes note regarding Costello's future with the Company, Costello's length of service appears immediately following his age (Plaintiffs' Trial Exhibit 23, p. 7011). In October 1977 Hughes directed an official of the Personnel Department, William Taylor, to prepare a listing of benefits which would be available to Cancellier if he were terminated at age 50. The memorandum received by Hughes notes "SRP - coverage ceases" (Plaintiffs' Trial Exhibit 84, p. 231). Absent termination, Ritter would have been entitled to receive Supplementary Retirement Plan benefits in 1984; Cancellier would have qualified in 1985; Costello would have been eligible in 1986 (Plaintiffs' Trial Exhibits 67, 68 and 69).

In 1970, at the time the Federated Organization and Key Manpower Plan commented upon the "high median age" of I. Magnin executives, 68% of I. Magnin employees in job classifications held by the Plaintiffs (Vice Presidents, Divisional Merchandise Managers and Buyers) were 40 years of age or older. At the end of the decade which began with the announcement that Federated should consider the "planned introduction of younger personnel" at I. Magnin, 67% of individuals in those three positions were under the age of 40 (Plaintiffs' Trial Exhibit 49; RT, Trial Transcript, Vol. 10, pp. 1371-1373).

Appendix E-2

Statement of Facts in Defendant's Opening Brief (Pages 8-19) and Addendum (Pages 1-6)

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(b) ADDITIONAL FACTS RELEVANT TO THE SEPARATE EMPLOYMENT SITUATIONS OF EACH PLAINTIFF AND TO THE GROSSLY EXCESSIVE VERDICTS RETURNED BY THE JURY.

(i) Cancellier.

The verdict (CR 530) in favor of Cancellier, who was earning $70,000 per year in one of the positions eliminated by management reorganization, was 6.7 times greater than his maximum recoverable ADEA back salary loss at the time of trial. This windfall was awarded to an employee who left to pursue personal business interests in spite of I. Magnin's offers of continued employment in two other positions of somewhat reduced responsibility at $60,000 per year. (RT 3355-56; Defendant's Trial Exhibit ["D.T.Ex."] PC 12.) These opportunities were offered to Cancellier out of consideration for his length of service (he was hired in May of 1953 and, after leaving to go into business for himself in 1959, rehired in June of 1960), and in recognition of his continuing value as an executive, notwithstanding the performance difficulties that in part had contributed to the elimination of his position as the supervisor of operations for I. Magnin's 22 branch stores. Cancellier flatly rejected the possibility of continued employment and instead negotiated for and received from I. Magnin a $70,000 severance payment.[11]

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11. Prior to leaving Cancellier had shared direct supervisory responsibility for the stores with Norman Chesler, then the 61 year old Vice President of Stores/Merchandising. (RT, 3294; D.T.Ex. PC-8.) Chesler's position also was eliminated by the same management reorganization, but he elected to continue employment with

The principal facts and events which led to what I. Magnin submits was Cancellier's *voluntary* resignation are as follows. Beginning in 1976, Ross Anderson, then the 56 year old Chairman and Chief Executive Officer of I. Magnin, began to have doubts about Cancellier's performance after various operations problems and complaints from branch store personnel and others came to his attention. (RT 1901-02; 3410-12; D.T.Ex. PC-9.) In 1977 Anderson became increasingly concerned about Cancellier's inability to provide high caliber leadership and about his inflexibility. (*Id.*, p. 2.) Anderson and Norman Wechsler, then the 65 year old President of I. Magnin,[12] also were concerned that both Cancellier and Chesler were not always effective in their shared, direct supervisory relationships with the store managers. (RT 3351-52; 2825-26.)

In addition, Anderson, Wechsler, and William Hughes, I. Magnin's Vice-President of Personnel, determined by the Fall of 1977 that better management of and communications with the 22 branch stores could be accomplished if there was just a single Vice-President of Stores, with centralized responsibility for both the stores' operations and merchandising activities, rather than having those responsibilities divided between the two positions held by Cancellier and Chesler. (RT 3353; D.T.Exs. PC-6 and 12.) In 1977 and early 1978, a management reorganization plan was deve-

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I. Magnin in a staff vice-presidency of somewhat reduced responsibility in his merchandizing area of expertise. I Magnin offered this alternative position to Chesler out of the same considerations, i.e., length of service and recognition of his continuing value as an executive, which motivated the offers that Cancellier rejected, (RT 3298-99; D.T.Exs. PC-3, Doc. 1225-26, and PC-12, Doc. 1221, 1236.) Chesler's responsibilities subsequently increased again, and at the time of trial he was the Regional Vice President for Northern California and the Pacific Northwest. (RT 3296.)

12. Wechsler previously had been the President of Saks Fifth Avenue, and was hired to be President of I. Magnin following his retirement from Saks in 1975. (RT 3768.)

loped which implemented the initial steps toward consolidating the responsibilities of the Vice-President Stores/Operations and the Vice-President Stores/Merchandising positions into one new position, which was entitled Senior Vice-President/Stores and assigned an authorized salary level of $90,000 per year. (RT 2421; D.T.Exs. PC-8 and 14.) Neither Cancellier nor Chesler were considered qualified for this newly created position, and an executive search for outside candidates was commenced. In the interim, until the new Senio. Vice-President/Stores position could be filled, all store managers were ordered to report directly to Anderson and Wechsler instead of Cancellier and Chesler. (RT 3769-70; D.T.Ex. PC-8.)

In the meantime, Cancellier retained his title of Vice-President, remained a member of the I. Magnin Executive Committee, and temporarily was assigned a staff role with continuing responsibilities for store operations, reporting directly to Anderson. (RT 2849-51; 2877-78; D.T.Ex. PC-8.) Chesler also was assigned a staff role, with the title Vice-President/Merchandise Administration, with continuing but somewhat reduced responsibilities for various merchandising activities reporting directly to Wechsler. (RT 3979-99; D.T.Ex. PC-8.) Anderson also offered Cancellier permanent continued employment opportunities as the Vice-President/Store Manager of either I. Magnin's flagship Union Square store, or the Chicago store, with the latter position involving the added opportunity of becoming the Regional Vice-President who was to be based in Chicago.

Cancellier was encouraged by Anderson and Wechsler seriously to consider continuing his employment with I. Magnin, especially as the Vice-President/Store Manager at Union Square. (RT 3354-55; 3771-73.) Cancellier flatly rejected these offers, which throughout this litigation he

has characterized as non-existent shams used to set him up, or worse. (RT 423; CR 490, pp. 317-19, 323-24, 337.) Cancellier became embittered about staying with I. Magnin, stating that he had no desire to remain with I. Magnin or Federated, and that he only desired to be "* * * treated fairly financially so that I may enter into new challenges." (CR 579, filed Feb 17 1981.)

* * *

(ii) Ritter.

The verdict (CR 528) in favor of Ritter, who was earning $35,500 per year as a Buyer of women's sports apparel at the time she was involuntarily terminated effective January 6, 1978, was 8.9 times greater than her maximum recoverable ADEA back salary loss at the time of trial. This grossly excessive recovery was awarded to an employee whom I. Magnin management repeatedly had counseled and warned about her use of abusive, obscene and scatological language to or in the presence of co-employees, vendors and customers, about her chronic inability to deport herself in a professional manner, and about the increasingly unsatisfactory merchandising results in her departments. Because of her length of service (she was hired in August of 1959), two I. Magnin supervisory teams unsuccessfully attempted to stop her outrageous conduct and to improve her faltering merchandising performance.

The utterly appalling nature of the misconduct which led to Ritter's involuntary termination is best illustrated by the testimony of those who had the misfortune of experiencing it. A good example is the insubordinate flaunting of her lack of respect for immediate superiors:

> "She said that Mr. Benham [the Divisional Merchandise Manager then her immediate supervisor] could roll the memo tightly and insert it in his ass, and that

> he could fuck himself with it." (This statement was made by Ritter in a loud voice to a co-employee, in the presence of customers, on the sales floor of the Rive Gauche department at the Union Square store; trial testimony of Amanda Burton, RT 1990, lns. 23-25.)
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> • • •
>
> "Well, among other things, she said that she was • • • 'tired of my shit,' • • • that she would go upstairs to the eighth floor, see Mr. Wechsler [then President of I. Magnin] and tell him how I was wasting her time with this shit. She said that I was dealing in gossip, that she had the facts on me and she would use them when she was ready." (Trial testimony of Robert Benham, RT 2478, ln. 21 to 2479, ln. 1.)

Other examples include her inexcusable disparagement of I. Magnin vendors, her blatant attempts to turn them against I. Magnin to advance her own personal interests, and the foulest possible insults which she repeatedly made to or about co-employees and others. (Testimony representative of these aspects of Ritter's misconduct is set forth in the Addendum [Addm.] to this brief at pp. A-1 to 4.) Shortly prior to her termination, Ritter also engaged in a 10-minute screaming fit and enraged tantrum in the presence of I. Magnin customers and employees who were attending a special showing of merchandise at the Phoenix Store. (Addm. at p. A-2 and 3.)

This is representative of the misconduct which prompted Wechsler to testify that Ritter was "almost a cancer" in the I. Magnin organization (RT 3779, ln. 23 to 3780, ln. 4), and which prompted Anderson to testify that Ritter "• • • had established a pattern for herself over these several years that would not have allowed her to go into another job with the company and be respected and accepted for

it." (RT 3450, lns. 9-12.) Ritter was given a $17,750 severance payment. (RT 661-62; P.T.Ex. 67.)

* * *

(iii) Costello.

The verdict (CR 529) in favor of Costello, who was earning $45,000 per year as the Divisional Merchandise Manager (DMM) of Accessories at the time he was involuntarily terminated effective May 1, 1978, was 6 times greater than his maximum recoverable ADEA back salary loss at the time of trial. This excessive recovery was awarded to an employee who, in the judgment of all his superiors during the years immediately prior to his termination, had generated poor morale and a lack of respect among his subordinates, had repeatedly demonstrated that he did not have the high-fashion merchandising and leadership skills required for a DMM level position, and had finally culminated a checkered career by twice failing over several years to perform competently in two different DMM positions.

There was substantial evidence to support this low assessment of Costello's qualifications as a DMM. It was an assessment uniformly shared by his subordinates, his immediate supervisors, and I. Magnin's top executive officers. Again, as in the case of Ritter, their testimony is the best illustration:

> "* * * As the President of the store, and one responsible for the merchandising results of the company, and the organization, I did not believe that Mr. Costello was doing his job properly.
>
> "He was not producing the results that we wanted in fashion leadership. He was not producing the results we wanted in developing buyers and giving them the expertise, his expertise, coaching them on the fundamentals. He was shady in his market relations. We were getting poor reports about that.

"And, on overall balance, I felt the company would be better off with having another individual in that important position.

"Q. Was [sic] there any other considerations you recall?

"A. The—the profit figures had been decreasing, the gross margin figures had gone down."

(Trial testimony of Norman Wechsler, RT 3776, ln. 16 to 3777, ln. 6.)

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"Q. Did you receive complaints from Mr. Fox[13] as to Mr. Costello's performance?

"A. Yes, I did.

"Q What were those complaints?

"A. That John was not a sufficiently oriented fashion merchant to handle the fast moving Accessory Division. He did not have the feel for the goods.

The other side of it was he was also not a good leader and had not gained the respect of his buyers."

(Trial testimony of Ross Anderson, RT 3368, ln. 21 to 3369, ln. 4.)

Other representative examples of testimony relevant to Costello's termination are included in the Addm. at pp. A-4 to 6. But the district court's prejudicial exclusions of evi-

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13. Neal Fox, the Vice President—General Merchandise Manager (GMM) who was Costello's immediate superior during the two years leading up to his termination, also had four other DMMs reporting to him. (RT 3475-76.) In the process of concluding that Costello must be terminated Fox reached the identical conclusion with respect to another of his DMMs named Bruce Leitstein. (RT 3528-29.) Leitstein and Costello were 38 and 54 years old, respectively, had comparable lengths of service (15 and 16½ years), and had comparable salaries ($47,000 and $45,000 per year), at the time Fox recommended that they both should be terminated for unsatisfactory performance. (RT 3523; 3519-20.) The district court erroneously excluded much of the testimony I. Magnin sought to introduce on Leitstein's obviously relevant comparative termination, and it prejudicially disparaged and emasculated the limited evidence which it did admit regarding Leitstein.

dence prevented the jury from hearing almost all of the testimony regarding the inappropriate sexual and personal remarks and conduct which went to the heart of Costello's unsatisfactory working relationships with his buyers and assistant buyers, almost all of whom were women. I. Magnin's offers of proof to establish that Costello's poor performance also involved these additional serious problems are included in the Addm. at pp. A-6 and 7. And there was substantial evidence with respect to Costello's inability to perform competently in another DMM position several years earlier. (Addm. at p. A-8.)

Out of consideration for Costello's length of service (he was hired in July of 1961), I. Magnin considered reassigning him to yet another position, but this possibility was foreclosed by the same management reorganization that had eliminated Cancellier's position.[14] When Costello failed to improve his performance as a DMM he was notified that he would be terminated effective May 1, 1978, and was given a $22,500 severance payment.

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(c) ADDITIONAL FACTS RELEVANT TO I. MAGNIN'S NON-AGE RELATED MOTIVATIONS FOR THE BUSINESS DECISIONS WHICH AFFECTED PLAINTIFFS' CONTINUED EMPLOYMENT.

None of the top I. Magnin decision makers (see Addm. at pp. A-8 and 9 for their ages), or for that matter any of the other I. Magnin executives employed during most of the last decade, had ever even seen, much less read or attempted to implement, the out-of-context statements which plaintiffs

14. The efforts by I. Magnin to salvage Costello's career formed the basis of his unsuccessful fraud and negligent misrepresentation claims, on which the jury returned separate defense verdicts. (CR 531 and 532.)

lifted from several of their major exhibits to claim that I. Magnin had a discriminatory policy of "the planned introduction of younger personnel." (RT 3104; 3350-51; 3784-85.) This six word phrase, which was repeated to the jury literally dozens of times throughout the trial, was taken out of context from plaintiffs' Exhibit 1, a 176 page organizational planning document prepared by now unknown individuals on the parent corporation's staff, dated February 10, 1970 and entitled "I. Magnin Organization and Key Manpower Plan (1970-1975) Draft III."[15] (RT 33, 3440-43, 3970-71, 3973-74, 4027.) Plaintiffs also repeatedly emphasized to the jury several statements taken from their Exhibit 46, which consists of six randomly selected pages (Nos. 9-12, 19 and 20) from what apparently was at least a 20

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15. This corporate staff analysis of I. Magnin's projected expansion in number of stores and personnel for the 1970-75 period noted that an unusually high percentage (almost 20%) of the key executive group was nearing retirement, and that the average age of the entire key executive group was substantially higher than the corporate wide median. An understandable concern was expressed about the need to identify experienced back-up and additional candidate to fill executive positions which would be vacated by retirement or created by expansion.

It is in this context, and this context only, that the unknown author of the analysis simply suggests that:

> "• • • a review of Magnin's profit sharing plan (upon which executives largely depend for retirement) may be timely. Magnin's should be certain that its benefits are adequate for all executives.
>
> A more subtle question relates to the implications of this age distribution upon Magnin's goal to have increasing impact in the youth market. An aging study of the rest of Magnin's management might disclose the need for the planned introduction of younger personnel—particularly in the merchandising and sales areas."

Significantly, there was no evidence that the suggested "aging study" was ever conducted, much less evidence that such a study had disclosed a "need for the planned introduction of younger personnel." (RT 2136-37; 3446-47.)

Further, executive turnover at I. Magnin was so high during the 1970's that none of the trial witnesses were even aware of this outdated staff analysis until it was brought to their attention in connection with this litigation. (RT 3106-07; 3350; 378-85).

page (or longer) overview of merchandising concepts prepared in the fall of 1969 for certain selling departments by a former I. Magnin DMM named Eric Steiner. (RT 2389-90; 2408; P.O.B. at 4) Steiner testified that this document was not a basis for any personnel decisions, particularly decisions affecting older sales persons at I. Magnin, many of whom were past the mandatory retirement age. (RT 2411-12.)

Both plaintiffs' Exhibit 1 and Exhibit 46 clearly were remote in time from the events in issue, and were totally irrelevant since they never had even been seen by any of the I. Magnin executives whose decisions some 8 years later affected the employment status of plaintiffs. But these erroneously admitted exhibits were susceptible to numerous out-of-context references to age by counsel for plaintiffs which were enormously prejudicial to I. Magnin.

An out-of-date form, entitled "Personnel Specification Sheet," which was used at the parent corporation's executive recruitment office in New York City, is another of plaintiffs' key exhibits which was never seen by any of the I. Magnin decision makers. (P.T. Ex. 7.) This is the form that contained the "desirable age" information category which Federated Vice-President, J. L. Tonner, testified either was left blank or was simply filled in "open" from the time she became responsible for the recruitment office in 1970. (RT 2417, 2420.) And this is precisely what was done when Tonner responded in February of 1978 to I. Magnin's request for an executive search to fill the new Senior Vice-President/Stores position that replaced the two lower-level positions previously held by Cancellier and Chesler. (P.T. Ex. 7; D.T. Ex. PC-14). It also is what was done with respect to Tonner's search for a new DMM of Accessories to replace Costello. (D.T. Ex. JC-17.) Age was as irrelevant to

Cancellier's and to Costello's departures from I. Magnin as it was to the search for their replacements.[16]

Finally, out of the more than 1,000 pages of handwritten and typewritten notes made by Bill Hughes during the approximately 3 years he was I. Magnin's Vice-President of Personnel, plaintiffs have lifted out of context a handful of notes which contain personnel data that occasionally refers to age. Hughes' notes in fact reflect literally hundreds of separate references to the management reorganization that eliminated Cancellier's and Chesler's positions, and to the extensive discussions and efforts by Anderson, Wechsler and Hughes to find continued employment opportunities for both individuals. These notes also contain repeated references, over approximately a 2 year period, to the constant concern of these top I. Magnin executives over the substantial misconduct and merchandising performance problems which led to Ritter's and to Costello's terminations. (D.T. Exs. PC-1 to PC-8, PC-12, JC-14 and ZR-2; RT 2843-47, 2995-3001, 3078-81, and 3086-90.)

• • •

16. The most sought after candidate to replace Costello was Anne Kartushyn, an experienced and highly qualified DMM working for an I. Magnin competitor in New York. At 48 or 49 Kartushyn was essentially in the same age bracket as all three plaintiffs, including Costello, and I. Magnin offered her $57,000 per year ($12,000 more than Costello was then making) to come to San Francisco. (RT 2429; D.T.Ex. JC-12.)

REPRESENTATIVE TESTIMONY RELEVANT TO RITTER'S TERMINATION

"Keep your fucking mouth shut." (Trial testimony of Ritter's last immediate supervisor, Alvin Somers, regarding Ritter's treatment of one of I. Magnin's most important vendors, RT 2191, ln. 24 through p. 2192, ln. 1.)

• • •

". . . Mrs. Ritter had been telling a vendor, 'I don't know how my customers are going to get their fucking tits into your goddamn dresses.' " (Trial testimony of Joan Greenfield, a co-employee whose distress over this statement by Ritter to another vendor prompted her to complain to Benham about this and other Ritter outbursts, RT 2656, lns. 10-13.)

• • •

"I told Mr. Benham I could not work in my office, and I was asking him if I could use his secretary's other desk to work. . . . I told him that it was difficult to work because of Mrs. Ritter's shouting and use of profanity." (*Id.* RT 2655, lns. 18-20, 25; 2656 ln. 1.)

• • •

"Well, Mr. Sherman called me and told me that he is under tremendous pressure from her. She had been calling him continuously to ask him to threaten me that unless she is—unless she is taken off warning he will stop selling to us." (Trial testimony of Mordechai Schafman, the Vice President-General Merchandise Manager who was Somers' immediate superior, RT 2679, lns. 17-21.)

• • •

"I received a phone call the following day after my dis-

cusion. Mr. Sherman was quite upset. He wanted to tell me that Mrs. Ritter had called him and asked him to pull out of I. Magnin, not to sell I. Magnin, if in fact Mrs. Ritter was not the buyer." (Trial testimony of Alvin Somers, RT 2252, lns. 11-15.)

"That fucking cunt couldn't sell anything." (Trial testimony of Deborah Winston with respect to another statement made by Ritter, on the selling floor, RT 1976, lns. 15-25; Ms. Winston also recalled Ritter referring to Mr. Benham as a "fucking idiot." *Id.*, RT 1977, lns. 1-2.)

• • •

"Well Mrs. Ritter would go to the floor generally every morning and she would go to the floor and would upset the sales people by sometimes calling them dumb or calling them lazy and on several occasions, it results in tears and many problems." (*Id.*, RT 1975, lns. 9-13.)

• • •

"Q. Mrs. Dirks, did you approach Mrs. Ritter and say anything to her?

"A. Yes, sir. Yes.

"Q. What happened at that time?

"A. I asked her what the problem was and she would not give an answer.

"Q. What did she do?

"A. She just kept screaming.

"Q. And when you say 'screaming,' do you mean by that literally?

"A. Yes.

"Q. All right.

"A. In a very loud voice.

"Q. Using profanities and obscenities?

"A. Yes."

(Trial testimony of Carolyn Dirks, then I. Magnin's

Phoenix Store Manager, RT 1948, lns. 9-25; Ms. Dirks also testified that throughout Ritter's profane and obscene tantrum "the most mild word was 'shit'." RT 1958, ln. 1.)

• • •

"Q. Will you tell us the reasons, please, why you concurred in the discharge or made your decision to discharge Mrs. Ritter?

"A. Well, my opinion of Mrs. Ritter's performance in her position in the organization. I felt that she had a demoralizing effect on the organization. I felt she was very disruptive and very derisive.

And, regardless of her actual performance, I think she was almost a cancer in her particular organization, and it was affecting our market relations, too.

"Q. You mentioned a moment ago about Ms. Ritter's market relations. What was your knowledge of them? (Trial testimony of I. Magnin President, Norman Wechsler, RT 3779, lns. 16-25).

• • •

"A. Well, two incidents: Whenever I visited New York I made an appointment to see as many manufacturers as I could. And I usually did this by myself.

And in one of them, Kimberly, for instance, the personnel there, the General Sales Manager said to me, 'There was no way we could ever do a good job with them because Mrs. Ritter was confused, indecisive. She really would come back and back and not know what to do. And we had already missed the first cuttings and we would be fortunate if we got into the second cuttings,' which meant our deliveries would be later than any of our competitors." (*Id.*, RT 3783, lns. 11-23.)

• • •

"Q. Did you look at that review before you approved her termination, Mr. Wechsler?

"A. No, I did not, because there had been so many strikes against Mrs. Ritter that, as I said, she had become a demoralizing, cancerous influence on the store, in my opinion and, as the President and Chief Operating Officer, with the responsibility for the merchandising, I strongly believed that the store would be better off without her." (*Id.*, RT 3809, lns. 7-14.)

REPRESENTATIVE TESTIMONY RELEVANT TO COSTELLO'S TERMINATION

"Q. Speaking about his [Costello's] relations with people, Mr. Fox, you talked on your direct testimony about playback from the buyers. Do you recall that?

"A. Yes, I do.

"Q. And you said that he had not generated the respect of the senior buyers; isn't that right?

"A. That is true.

"Q. You also stated that Diane Durham gave you, and I think this is a quote, chapter and verse, closed quote, on John Costello; do you remember that?

"A. Yes.

"• • • Ms. Durham and I had a lengthy conversation after this review is committed to paper with regard to Mr. Costello. But, prior to that there were comments dropped by many people about Mr. Costello's ability or inability to cope with people and relationships in terms of playback and assistance, staff people, people he interacted with on a day to day basis.

"Q. So your testimony now is that Ms. Durham spoke to you directly in terms of John Costello specifically?

"A. • • • I had a lengthy conversation with Ms. Durham in regard to Mr. Costello at the time that I told Ms. Durham that she was going to be elevated to a divisional job in

another area. And at that time she in effect spilled her guts to me in regards to John Costello.

Out of a cumulative basis but prior to that on occasion there was just comments dropped and/or body language or non-verbal behavior with Ms. Durham and several of the other people that worked with Mr. Costello."

(Trial testimony of Neal Fox, the Vice President-General Merchandise Manager who was Costello's immediate superior during the two years leading up to and including his termination, RT 3562, ln. 6 to 3563, ln. 18.)

• • •

"Ms. Durham as a senior buyer and the most respected buyer in that [Costello's] division in terms of performance at every level became a mother hen in there for the young buyers and evidently and obviously, the younger people within the division came to her seeking help and guidance in terms of the difficulty they were having with their relationship with Mr. Costello.

"• • • Yes. Because in terms of discussions of this type she [Durham] was conveying to me a generalized feel as a sensitivity for John Costello's inability to cope with people and the fact that day to day she was being bombarded with individuals coming to her seeking some guidance in terms of the people relationship aspects." (Trial testimony of Neal Fox, RT 3567, ln. 8 to 3568, ln. 9.)

• • •

"A. I complained to Mr. Fox that Mr. Costello wasted a lot of my time when I would have meetings with him.

"• • • Q. And what specifically about the taking of the orders to Mr. Costello did you relate to Mr. Fox in that meeting?

"A. That it made me upset because when I would get in there to have the orders signed, instead of taking 15 minutes or 20 minutes, which would be the amount of work involved in going through the orders, that often it would take and hour, hour and a half because Mr. Costello would be taking or receiving a lot of personal phone calls.

"Q. All right. Did you tell Mr. Fox anything else about these meetings with Mr. Costello regarding the order situation?

"A. • • • I just told Mr. Fox that I had told Mr. Costello if he wants me to come back • • • That if he wanted me to come back, I would be glad to come back but I didn't want to sit there and listen to him talk about his real estate. That I really had a lot of work to do."

(Trial testimony of Diane Durham, one of the Senior Buyers who worked for Costello, RT 3277, ln. 18 to 3279, ln. 4.)

• • •

"Q. Now, with just that limitation that the court has given you, what did you tell Mr. Fox? • • •

"A. I told him about a specific incident with a vendor by the name of Yves Saint Laurent Colony Jewelry . . . That Mr. Costello spent most of the time talking on the telephone and that I was attempting to buy the line and that I had to go back and work the line when Mr. Costello wasn't with me because of all the time spent discussing other matters during my appointment that I had set up." (*Id.*, RT 3270, lns. 19-20; RT 3271, lns. 11-13, 16-20.)

• • •

Appendix F-1

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 22

AGE AS DETERMINATIVE FACTOR

In order to prove that one was discharged because of his/her age in violation of the Age Discrimination in Employment Act of 1967, one must prove more than just that age was one factor in the decision to terminate the employment relationship; it must be proven that age was the determining factor in the discharge.

In order to prove that age was the determining factor in the discharge, one must prove, by a preponderance of the evidence, that the termination would not have occurred "but for" the employer's motive to discriminate against the employee because of his/her age. In other words, if not for the employer's motive to discriminate because of the employee's age, the employee would not have been discharged.

GIVEN: .....
MODIFIED: .....
DENIED: .....
WITHDRAWN: .....

.....
UNITED STATES DISTRICT JUDGE

Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274, 285-286 (1977); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 317 (6th Cir. 1975).

Appendix F-2

PLAINTIFFS' INSTRUCTION NO. 36

ADEA—STANDARD OF CAUSATION

It is not necessary for a plaintiff to prove that age was the sole or exclusive reason for the defendant's decision to remove the plaintiff from his or her position. There could be more than one factor in the decision to remove the plaintiff, but the plaintiff is entitled to recover if one factor was the plaintiff's age, and age made a difference in whether the plaintiff was discharged or adversely affected in his or her employment.

[*EEOC v. Baltimore & Ohio Ry. Co.*, ... F.2d ...., 23 FEP Cases 1381, 1382 (4th Cir. 1980); *Sahadi v. Reynolds Chemical*, ... F.2d ...., 23 FEP Cases 1338, 1339-1340 (6th Cir. 1980); *Smithers v. Bailar*, ... F.2d ...., 23 FEP 1206, 1208-1211 (3rd Cir. 1980); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013-1014 (1st Cir. 1979); *Cleverly v. Western Electric Co.*, 594 F.2d 638, 641 (8th Cir. 1979); *Kentroti v. Frontier Airlines*, 585 F.2d 967, 969, 18 FEP Cases 364, 366 (10th Cir. 1978); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312-313 (6th Cir. 1975); *Carolan v. Central Freight Lines, Inc.*, 489 F. Supp. 941, 944, 22 FEP Cases 1593, 1595 (E.D. Tex. 1980); *Criswell v. Western Airlines*, ... F.Supp. ...., 23 FEP Cases 1511, 1513-1514 (Cent. Dis. Cal. 1979); *Scofield v. Bolts & Bolts Retail Stores, Inc.*, ... F.Supp. ....., 21 FEP Cases 1478, 1480 (S.D.N.Y. 1979); *Geller v. Markham*, 481 F.Supp. 835, 838-841 (D.C. Conn. 1979); *Olsen v. Southern Pacific Transportation Co.*, 480 F.Supp. 773, 779 (N.D. Cal. 1979); *Coates v. National Cash Register Co.*, 433 F.Supp. 655, 660, 661 (W.D. Va. 1977).]

GIVEN AS REQUESTED .....

GIVEN AS MODIFIED .....

REFUSED .....

WITHDRAWN .....

.....

UNITED STATES DISTRICT JUDGE

Appendix F-3

Defendant's Objection

(R.T. 3960:5-19)

"MR. CONNERS: Our principal complaint here, Your Honor, as to the instructions is I think they take away the heart of the defense in an age discrimination case.

THE COURT: Excuse me, Mr. Connors. Perhaps I didn't make myself clear. I was not going to invite counsel's comments with respect to those instructions I had already chosen to give. What I was going to do is give you an opportunity to invite my attention to other instructions that you would like.

MR. CONNORS: That is what I am going to do, Your Honor.

I am saying that the omission of 22, 23, 24, 24A, 24B and 26 take away the heart of the defense. That is to say that the discharge, the but for factor, is not contained in any of the instructions Your Honor proposes to give."

Appendix F-4

Plaintiffs' Objection

(R.T. 3961:25-3963:1)

Ms. De Oddone: Your Honor, we believe that the instructions regarding the standard of causation under the A.D.E.A. is something that must be included in the instructions in order to give the jury the complete statement of the obligations of the plaintiffs under the law.

The Court: To what number do you refer?

Ms. De Oddone: I am referring to a plaintiffs' 36. And if I may, I would like to read to you a statement of—from Olsen versus Southern Pacific Transportation Company, which was a decision by Judge Schwarzer of this court in which he set forth a standard of causation under the A.D.E.A. in a way that summarizes the entire line of cases from Logasus [Laugesen] to the present. Logasus is the language that is used in plaintiffs' 36.

"Plaintiff did not have to show that age was the sole ground for the decision not to transfer him." In this case it was a transfer case, "What he had to prove was that age was a determining factor in the decision, i.e., that age made a difference in the sense but for that factor the company's decision would have been different."

Now, our concern is that by failing to give such an instruction the jury will not realize that a plaintiff does not have the burden of proving that age was not the sole factor. The plaintiff does not have to prove that age was the sole factor. The plaintiff need only prove under the A.D.E.A. that age was a determining factor in the sense that I just read.

Appendix G-1

PLAINTIFFS' INSTRUCTION NO. 34

ORDER AND BURDEN OF PROOF UNDER THE ADEA

In order to establish liability for violation of the ADEA, each plaintiff bears the burden of persuading the jury of his or her claim by a preponderance of the evidence.

In proving his or her claim, each plaintiff must first establish certain initial facts by a preponderance of the evidence.

These necessary initial facts are:

1. That the plaintiff was between the ages of forty and seventy years;

2. That an adverse employment action was taken against him or her;

3. That he or she was qualified for the position held; and

4. That he or she either was replaced by a younger person or his or her functions were performed by a younger person, or produces evidence of discriminatory intent, or statistical evidence of discriminatory conduct ~~or evidence that he or she was treated more harshly than a similarly situated younger employee~~.

If you find that a plaintiff has failed to establish these initial facts, you should decide in favor of the defendant as to liability to that plaintiff.

However, if you find that the plaintiff has established by a preponderance of the evidence each of these necessary initial facts, then the defendant must offer sufficient rebuttal evidence, which may be done by giving evidence to ex-

plain or articulate a reasonable, nondiscriminatory basis for the action taken against the plaintiff. If you find that the defendant fails to state a reasonable, nondiscriminatory reason for its actions against plaintiff, you should render a verdict against the defendant as to that plaintiff.

~~However, even~~ if you find that the defendant has articulated a reasonable, nondiscriminatory basis for its actions against the plaintiff, you must render a verdict for the plaintiff if he or she establishes by a preponderance of the evidence that the defendant's reason is a pretext for age discrimination. When I use the word pretext, I mean that the defendant's action was not really based upon the reason stated.

On the other hand, if a plaintiff fails to establish by a preponderance of the evidence that the rebuttal reasons stated by the defendant were pretextual, then you should render a verdict in favor of the defendant and against that plaintiff.

Appendix G-2

PLAINTIFFS' INSTRUCTION NO. 35

DEMOTION AS VIOLATION OF ADEA

An employer may not demote an employee for reasons which violate the ADEA. Moreover, an employee need not accept such a demotion if offered.

QUESTIONS PRESENTED

A. Is it proper function of a Court of Appeals, once having found error, to determine whether that error was prejudicial and does its conclusion, based upon the error not being an incorrect statement of the law, the invitation of that error by the complaining party and the factual record which demonstrated that another result would not have been obtained, warrant review upon a petition for certiorari under United States Supreme Court Rule 17.

B. Has Federated stated any ground for the issuance of a writ of certiorari authorized by Rule 17 of the United States Supreme Court Rules in its request that this Court review the record of a six-week trial to determine whether the Court of Appeals wrongly concluded that adding words such as "and that means a factor which made a difference" to the phrase "a determining factor" would not have altered the outcome of this trial.

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs in this action and Respondents before this Court are three individuals, Philip Cancellier, John Costello and Zelma Smith Ritter. The Defendant-Petitioner is Federated Department Stores, Inc., d.b.a. I. Magnin; I. Magnin is, and was at all relevant times, an operating division of Federated.

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Fillippon v. Albion Vein Slate Company, 250 U.S. 76 (1919) 17

Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980) 19

Kelly v. American Standard, Inc., 640 F.2d 974 (1981) 19

Kend v. Chroma-Glo. Inc., 478 F.2d 198 (8th Cir. 1973) 14

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Loeb v. Tetron, 600 F.2d 1003 (1979) 19

Lynch v. The Travelers Indemnity Company, 452 F.2d 1065 (8th Cir. 1972) 14

McCandless v. United States, 298 U.S. 342 (1936) 11, 15, 16, 17

McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973) 3, 8, 9

Mercer v. Paris Theriot, 377 U.S. 152 (1964) 17

Olsen v. Southern Pacific Transportation Co., 480 F.Supp. 773 (N.D. Calif. 1979) aff'd 654 F.2d 733 (9th Cir. 1981) 19, 20

Pherson v. Goodyear Tire & Rubber Co., 590 F.2d 756 (9th Cir. 1978) 15

Pullman-Standard v. Swint, ... U.S. ....., 72 L.Ed.2d 66 (1982) 18

Spagnuolo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir. 1981) cert. denied ..... U.S. ....., 102 S.Ct. 316 (1981).. 19

Vanskike v. ACF Industries, 665 F.2d 188 (8th Cir. 1981), cert. denied, ... U.S. ....., 71 L.Ed.2d 867 (1982) 14

Table of Authorities Cited

Statutes

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United States Supreme Court Rule:	
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Rule 17(1)(a)	18

Other Authorities

Traynor, The Riddle of Harmless Error (Ohio University Press, 1970), pages 20-22	12

No. 82-49

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

FEDERATED DEPARTMENT STORES, INC., d.b.a. I. MAGNIN,
Petitioner,

VS.

PHILIP D. CANCELLIER, JOHN W. COSTELLO and
ZELMA SMITH RITTER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINION BELOW

The opinion rendered by the Court of Appeals, as modified upon Federated's Petition for Rehearing, is attached as Appendix A. The opinion, as yet in unmodified form, is reported at 672 F.2d 1312 (9th Cir. 1982).

JURISDICTION

The jurisdiction of this Court and of the Court of Appeals is correctly set forth in Petitioner's brief. Plaintiffs predicated jurisdiction over the action upon the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 626(b) and (c) and upon 28 U.S.C. § 1337, 28 U.S.C. § 1332 and the federal court's pendent jurisdiction.

STATUTE INVOLVED

The statute involved is the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* Petitioner's brief sets forth relevant portions of the statute.

STATEMENT OF THE CASE

This action, tried before a jury in December 1980 and January 1981, contested the termination of three long-term I. Magnin executives: Philip Cancellier, last employed as Vice President of Stores/Operations; John Costello and Zelma Smith Ritter, employed respectively at the time of terminations as Divisional Merchandise Manager/Accessories and Buyer-Sports Apparel. All were terminated in early 1978; all were in their early 50's at the time of discharge and all had worked for I. Magnin throughout their careers.

Each Plaintiff prevailed on three causes before the jury; violation of the ADEA, breach of personnel policies and violation of a covenant of good faith and fair dealing implied by California law in contractual relationships. The latter two causes were pled as arising under the court's pendent jurisdiction; at no time did Federated move to dismiss those claims.

Because the questions presented by Federated all dispute the Ninth Circuit's conclusion that the jury verdict would not have differed had the district court further explained its instruction that age must have been a determining factor in the employer's personnel policies or practices and in the Plaintiffs' terminations, this Statement of the Case will summarize the record evidence of age discrimination and delineate the ADEA instructions presented to and given by the district court.

A. The Record of Age Discrimination

The Court of Appeals was polite to the Petitioner in its statement that "this case was not decided by a hairsbreadth" (p. A-5 of Appendix A). In addition to circumstantial proof of discrimination meeting the framework established by *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792 (1973), the record was replete with direct evidence that Federated at its I. Magnin division had for many years implemented a policy of age discrimination which permeated its personnel practices in the areas of hiring, evaluation, promotion and discharge. The record also contained direct evidence, recorded in the hand of I. Magnin's Vice President of Personnel, that such policy had been specifically applied to each of the Plaintiffs in conjunction with their discharges. Examples of the direct proof of age discrimination contained in this record are:

1. A 1969 study of departments selling merchandise bought by Plaintiff Ritter which referred to the salespeople in San Francisco as "terribly old," "super-annuated" and concluded that I. Magnin needed that " 'ageless' salesperson of thirty to forty-five who relates more effectively to both customer and merchandise." The report also noted that one department should be "much younger in both setting and selling." (Plaintiffs' Ex. 46, R.T. Vol. 15, pp. 2389-2398).

2. A February 1970 document prepared by Federated entitled "Organization and Key Manpower Plan (1970-1975)" which contained what was termed an "age distribution analysis" showing that I. Magnin's key executive group was generally older than its counterparts in other Federated divisions. The Plan suggested a course of action arising from the observation of executives' ages in the following statement: "A more subtle question relates to the implications of this age distribution upon Magnin's goal

to have increasing impact in the youth market. An aging study of the rest of Magnin's management might disclose the need for the planned introduction of younger personnel —particularly in the merchandising and sales area." (Plaintiffs' Ex. 1).

3. A reference in the same 1970-1975 report equating age with a lack of promotability in the statement about one employee that "because of age (59) she has, of course, reached her potential." (Plaintiffs' Ex. 1).

4. A form used until approximately two months before trial to recruit executive personnel entitled "Personnel Specification Sheet" which listed as one of the seven categories of information relevant to the selection process "Desirable Age." (Plaintiffs' Ex. 7, R.T. Vol. 15, pp. 2430-2431).

5. Written communications over the period from 1975 through the end of 1979 between I. Magnin and one of its executive placement firms, Business Careers, Inc., showing the utilization of a youth criterion in the hire of executives. Candidates for hire are consistently referred to as "young" and "energetic" or "ambitious." In July 1975 Business Careers wrote to the then Vice-President of Personnel: "Rest assured, Mr. Hughes, we shall continue to recommend to you outstanding young men with fashion management experience as we have in the past." (Plaintiffs' Ex. 11).

6. The text of a speech given by the Chief Executive Officer to the Federated Board of Directors in October 1975 stating that I. Magnin's junior departments were "staffed by the young" and were "young, bright and bouncy." (Plaintiffs' Ex. 34, pp. 2-3; R.T. Vol. 4, pp. 322-325).

7. A 1977 organizational chart bearing the label "highly confidential" which identified key executives by their ages

and set forth possible replacements for those executives. On that chart was Philip Cancellier, "age 50," with his eventual replacement, Henry Neloms, then age 33, identified as a possible successor. (Plaintiffs' Ex. 17, R.T. Vol. 20, p. 3379).

8. Testimony by Lydia Dresnek, once a co-Buyer in Plaintiff Ritter's division, that she was informed by her supervisor in September, 1973 of management's plan to get rid of the "old biddies." Dresnek was assured that she would be protected because she "looked young." (R.T. Vol. 11, pp. 1616-1621).

9. Testimony of John Costello that his immediate supervisor referred to a buyer in her early 50's as "menopausal" and as buying handbags which "looked as old as she did." (R.T. Vol. 7, pp. 845-848).

10. Testimony by Cancellier concerning a statement made by the President of I. Magnin that while he was sorry Cancellier was no longer there, the "people at Federated wanted them to get a lot of young people around here." (R.T. Vol. 4, p. 329).

11. A handwritten note made by the Vice-President of Personnel for I. Magnin recording a January 3, 1978 conversation between himself, the Chief Executive Officer and the President of I. Magnin where adverse employment action against Cancellier was discussed containing the following phrase under the initials "PC": "Age 50. Maximum potential!" (Plaintiffs' Ex. 20).

12. Notes of an April 1977 meeting among Costello's immediate supervisor, the President, Chief Executive Officer and Vice-President of Personnel, again the note-taker, containing a review of Costello with "age 53" recorded immediately next to his name. The document, memorializing

an evaluation session, has several references to employees' ages. (Plaintiffs' Ex. 23).

13. A December 1976 notation by the Vice-President of Personnel made in conjunction with an adverse employment action against Zelma Smith Ritter setting forth a calculation of her age, then 51, and her years of service, a calculation which would show whether Ritter was nearing eligibility for coverage under the Federated Supplementary Retirement Plan.

14. A chart introduced through one of Plaintiff's expert witnesses showing that at the beginning of the 1970's, 68% of individuals holding Plaintiffs' positions were 40 years or older but that at the end of the decade 67% of those same positions were filled with persons below the age of 40. (Plaintiffs' Ex. 49).

15. Testimony introduced through Plaintiffs' statistical expert concerning the involuntary terminations of I. Magnin executives potentially qualified to receive Supplementary Retirement Plan benefits during the period 1976 through 1979 expressing the conclusion that the likelihood of such numbers being terminated by chance was less than one in one hundred. (R.T. Vol. 10, pp. 1385-1386).

16. A stipulation introduced at trial that of the executives potentially eligible to receive Supplementary Retirement benefits, only three had ever qualified from the inception of the plan in 1976 through the date of trial in December 1980. (R.T. Vol. 12, pp. 1737-1738).

17. An admission by the former Chief Executive Officer during his trial testimony that I. Magnin had implemented a policy of having younger people in the merchandising areas appealing to younger customers and that "older people" had been "moved" to other areas pursuant to that policy. (R.T. Vol. 20, pp. 3440-3441).

The above listing does not include evidence indirectly demonstrating that each Plaintiff was terminated because of age. Each was replaced by a substantially younger individual or individuals; each Plaintiff presented convincing evidence that the asserted reasons for the termination were pretextual. While this statement will not detail the indirect evidence of age discrimination presented by the Plaintiffs, three examples suffice to convey the pretext inherent in Federated's articulated reasons.

Federated argued at trial that Cancellier had voluntarily resigned his employment. The then current Vice-President of Personnel testified that Cancellier had so resigned notwithstanding that Vice-President's completion of an unemployment compensation form in May 1978 labeling the reason for Cancellier's termination a "discharge" and on which the Vice-President wrote as an explanation for the severance of employment "released for performance reasons." (R.T. Vol. 21, p. 3737; Plaintiffs' Ex. 58).

Although Federated claimed that Costello's work performance was the reason for termination, Federated official Henry Neloms admitted during the trial that Costello's division led the Company in the category of gross merchandise margin percent, viewed by Neloms as an "extremely important" measurement of performance. (R.T. Vol. 13, p. 1875).

Federated claimed at trial that a major reason for Ritter's termination was her swearing even though Federated's own witnesses time and time again conceded that swearing and shouting were day-to-day occurrences in the I. Magnin business world. (R.T. Vol. 13, p. 1960; Vol. 17, pp. 2917-2918, p. 1930; Vol. 19, p. 3322).

In sum, Federated's position before this Court that the evidence was "sharply disputed," as one assumes will be

true of any case that proceeds to trial, does nothing to dispel the Court of Appeals' justifiable reliance upon the overwhelming indicia of age discrimination in this record for its conclusion that "there was ample evidence that consideration of age 'made a difference' in the termination of Cancellier, Costello and Ritter." (Appendix A, p. A-5).

B. The ADEA Instructions

Federated presented forty-four proposed instructions on the ADEA and the elements that each Plaintiff was assertedly required to prove under that statute (C.R. 444). That number, which does not include Federated's proposed instructions on the calculation of damages under the ADEA, was in part due to Federated's submission of separate instructions for each of the Plaintiffs. Printed as Appendix B to this brief are ADEA instructions submitted by Federated concerning Cancellier; the duplicative instructions concerning Costello and Ritter are not repeated. Following its initial instructions, Federated filed an amended instruction No. 21 (C.R. 501); that instruction, given by the court without substantial modification, forms the basis for Federated's contentions before this Court.

Plaintiffs submitted four proposed instructions on the meaning of the ADEA and the standard and order of proof of an ADEA claim. Three of the Plaintiffs' four instructions are printed as Appendix C. The one that is not reproduced concerned the meaning of the ADEA; it was not given by the court. Plaintiffs' Proposed Instruction No. 34, that setting forth the order and elements of proof under *McDonnell-Douglas Corp. v. Green, supra,* was given by the court in substantially unchanged form. The *"McDonnell-Douglas"* instruction has never been challenged by the Defendant in the appeal of this case.

A further instruction proposed by Plaintiffs, No. 36, stated that Plaintiffs need not prove age as a sole or exclusive reason for the Defendant's decision and noted that Plaintiffs were entitled to recover if they demonstrated that "age made a difference in whether the Plaintiff was discharged or adversely affected in his or her employment." Even though the Plaintiffs' proposed instruction contained the language "made a difference," the omission of which Federated now asserts requires a new trial, Federated objected to Plaintiffs' proposed instruction (C.R. 524).

The instructions actually given on the proof of an ADEA claim are set forth in Appendix D. After providing the *McDonnell-Douglas* instruction, the court read the instruction taken from Defendant's Proposed Instruction No. 21. The jury was told, *inter alia*:

> The statute I have just summarized, which is the statute under which Plaintiffs bring part of this action, forbids discrimination because of age. It does not, for purposes of this lawsuit, forbid any other type of discrimination, nor does it forbid any other action or inaction by Defendant relative to Plaintiffs other than discrimination on account of age.

The court continued:

> Age must be a determining factor in an employer's personnel policies or practices before a violation of the Act occurs. Put another way, the basic principle is that an employer has the right to discharge an employee, absent age discrimination. Thus, if you should find that age was not a determining factor in Plaintiffs' terminations, or failure to be reemployed, then you must render a verdict for the Defendant on these issues, even though you might feel their terminations were unreasonable, arbitrary, or unfair.

Having submitted six different instructions concerning the proof of an ADEA claim and having objected to Plain-

tiffs' proposed instruction on the standard of causation, Federated nonetheless has contended before both the Court of Appeals and now before this Court that it deserves a new trial because the district court chose one of its instructions discussing the necessity of finding age to have been "a determining factor" instead of rather than in addition to another instruction which it also proffered containing the phrases "the determining factor" and "but for."[1]

SUMMARY OF ARGUMENT

Federated has presented no "special or important" reasons for the granting of certiorari. It has never been the law that all errors involving substantial rights require reversal.[2] A Court of Appeals is empowered, and indeed

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[1]Plaintiffs do not believe that Federated ever clearly articulated its present objection before the district court as required by Rule 51 of the Federal Rules of Civil Procedure. The only objection phrased by Federated was that cited at Appendix F-3 of Petitioner's brief. Federated contested the omission of Defendant's Proposed Jury Instructions 22, 23, 24, 24A, 24B and 26 on the basis that the "but for factor" was not provided. Federated did not state as it does now that an explanation should have been added to its proposed instruction 21 in order to define the term "a determining factor"; Federated instead continued to insist that the vast bulk of its ADEA instructions including those containing extremely argumentative language, as did 24-A and 24-B, be given as the "heart" of its defense.

[2]Plaintiffs did not concede before the Court of Appeals, and do not here concede, that the ADEA instruction was an erroneous one involving a substantial right. Plaintiffs believe that if any misunderstanding was engendered by Defendant's Proposed Instruction No. 21, is was one arising from an overemphasis on Federated's managerial prerogatives with the instruction's three references to the Defendant's ability to act for non-discriminatory reasons even if those reasons were deemed "arbitrary, unreasonable or unfair." Plaintiffs contend that the instruction could be read as setting too high a standard, leaving an impression that age must be the "sole" reason. Moreover, Plaintiffs have not agreed that the phrase "a

obligated, to examine the entire record to determine whether the error was so prejudicial as to require a new trial. That examination must encompass all circumstances of the case, including the nature of the error, facts as to how the error was introduced and whether a different result would have occurred absent the error.

As noted in its modification upon Defendant's Petition for Rehearing, the Ninth Circuit reached its conclusion of the absence of prejudice in accordance with the standard enunciated by the United States Supreme Court in *McCandless v. United States,* 298 U.S. 342 (1936). There is nothing in the Ninth Circuit opinion or the record of this case which even remotely suggests that the Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Rule 17, United States Supreme Court Rules.

Federated has proclaimed this case as one of nation-wide import, referring to matters outside the record in support of its proclamation (Federated's Petition, pp. 10-11, fn. 14). Federated does so in an apparent attempt to convince this Court that it must instruct future litigants as to the proper course of trying an ADEA case. The difficulty with Federated's position is that the Ninth Circuit has already accomplished that end. It has told ADEA litigants that the instruction which must be utilized is that set forth in footnote 2 of its Opinion.

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determining factor" did not provide the jury sufficient guidance. In our view, the phrase is one that has ordinary meaning and clearly conveys the concept that age must have tipped the balance in the determination. Notwithstanding this position, Plaintiffs have accepted, for purpose of their opposition to the petition for certiorari, the Ninth Circuit conclusion of error in order to squarely meet the questions posed by Federated.

The only issue remaining is one wholly unique to this case. It is whether the Ninth Circuit acted in a manner warranting this Court's intervention when it concluded that substantial justice does not require a re-trial of this case. That conclusion, premised as it must be upon the entire record, is one well within the realm of authority normally committed to the circuit court level. Indeed, it is hard to imagine a decision of more substantial injustice than one which would require Plaintiffs to re-try a case where they have presented extraordinary evidence of direct discrimination, where they proposed an instruction to which Federated objected setting forth the "made a difference" explanation now sought by Federated and where it was Federated's own language, presented in a maze of ADEA instructions that was utilized by the court and to which Federated now excepts.

ARGUMENT

A. The Court of Appeals' Determination That the Instructional Error Did Not Prejudice Federated Is Not in Conflict with Any Applicable Decision of This Court Nor Is It a Substantial Departure from the Accepted and Usual Course of Judicial Proceedings

Federated seems to suggest at pages 17-19 of its petition that the overwhelming nature of evidence can never justify a conclusion that an error was not prejudicial.[3] Moreover, Federated challenges the Court of Appeals' reliance upon

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[3]Such suggestion is inconsistent with the writings of the commentator cited by Federated at pages 19-20, footnote 19. Justice Traynor is quoted as having written: "Overwhelming evidence may provide support, *even conclusive support*, for holding the error harmless, but it is not invariably conclusive." Traynor, The Riddle of Harmless Error (Ohio University Press, 1970), pages 20-22; emphasis added.

"ample evidence," apparently contending that ample means something different than overwhelming so that even if overwhelming evidence suffices, the Ninth Circuit did not correctly phrase its conclusion.

What the Court of Appeals found was that the outcome of the trial would not have differed even if the jury had been instructed in the manner urged on appeal by Federated. That the result would not have been more favorable to the complaining party even if the error had not occurred is the traditional definition of "prejudice." The record fully supports the Ninth Circuit's conclusion. To contend that the jury would have decided that age did not play a determining role in the Plaintiffs' discharges if it had been told that the phrase "a determining factor" means a factor that makes a difference or a "but for" factor is to argue in the realm of semantics without relationship to the facts of this case.

Weighing the nature of the error in light of the record is precisely in accord with this Court's direction of determining when an error is harmful provided in *Kotteakos v. United States of America*, 328 U.S. 750 (1946). The Court there phrased the necessary test as "what effect the error had or reasonably may be taken to have had upon the jury's decision." 328 U.S. 764. That decision cannot be subject to any presumption requiring reversal whenever a substantial right is involved, as Federated seems to urge here. Instead the presence of prejudice must be determined based upon the particularized factors of the case. The Supreme Court has stated:

> The only permissible presumption would seem to be particular, arising from the nature of the error and 'its natural effect' for or against prejudice in the particular setting.

Id. at pp. 765-766.

Courts of appeals have long engaged in the type of evaluation process undertaken by the Ninth Circuit in this case. That process has included an analysis of the potential impact of the error, whether the error could be attributed to the complaining party and the degree of evidence supporting the result reached below. In *Lynch v. The Travelers Indemnity Company,* 452 F.2d 1065, 1067 (8th Cir. 1972), the court considered the defendant's contention that the district court had erred in advising the jury that plaintiff could recover under an insurance policy if it proved that a windstorm was the direct and efficient cause of the loss. Defendant argued that the correct legal standard was one of "sole" cause. The court concluded that even if the instruction could be deemed error, the use of it did not prejudically affect the substantial rights of the parties as it was unlikely that modification of the instruction would have changed the jury's verdict.

In *Kend v. Chroma-Glo, Inc.,* 478 F.2d 198 (8th Cir. 1973), the court found that an instruction in an agency case which was contested because it used the term "effective cause" without further definition was not error as the court deemed it "unlikely" that a different instruction would have changed the jury verdict.

In the recent case of *Vanskike v. ACF Industries,* 665 F.2d 188, 203 (8th Cir. 1981), *cert. denied,* ..... U.S. ....., 71 L.Ed.2d 867 (1982), the court of appeals upheld a jury determination in favor of the plaintiff even though it found that instructions concerning coverage under the Federal Employers Liability Act were argumentative. The court found that under the circumstances of the case, reversal was not required. Circumstances considered included the facts that the instruction was not substantively incorrect and the evidence supporting coverage was "overwhelm-

ing." The court found that because the instruction would not have changed the result, the error was "harmless."

In *Pherson v. Goodyear Tire & Rubber Co.*, 590 F.2d 756, 760-761 (9th Cir. 1978), the court refused to reverse a jury determination in favor of the defendant even though the jury had been arguably misinstructed on the burden of proof. The elements relied upon by the court in reaching that conclusion included the fact that the appellant's own instruction misplaced the burden, termed "invited error" by the court, the conclusion that the defendant had, in any event, effectively shouldered the burden and the fact that the record indicated a new trial would not result in a different verdict. The court stated:

> Third, a new trial would serve no purpose in any event. . . . We deem it highly improbable that a new trial would result in a verdict favorable to appellant and therefore find that the alleged error did not prejudice appellant.

590 F.2d at 761.

In *Dairyland Insurance Co. v. Makover*, 654 F.2d 1120, 1127-1128 (5th Cir. 1981), the court refused to overturn a verdict concerning coverage under an insurance policy even though the district court did not define the meaning of the term "implied permission." While the court found that it would have been "better practice" to provide explanation of the term, it concluded that the fact that such practice was not followed did not constitute reversible error.

Quoting extensively from the unmodified opinion (*see* pages 13-14 of Petitioners' Brief), Federated argues that the Court of Appeals did not follow the standard enunciated by *McCandless v. United States, supra*, that it must affirmatively appear from the record that error relating to

a substantial right was not prejudicial (Petitioner's Brief, p. 16). It is difficult to ascertain upon what Federated bases this conclusion.

The Ninth Circuit stated that it applied the *McCandless* standard after a careful reading of the transcript and record. The Ninth Circuit also delineated the factors upon which it based that conclusion, particularized factors which are appropriately considered in accordance with this Court's decision in *Kotteakos v. United States of America, supra* and in line with the evaluation processes undertaken by courts of appeals in the cases cited above.

The only reason given for Federated's assertion that the Ninth Circuit did not appropriately follow the *McCandless* standard is its claim that the evidence was "sharply disputed." Federated's denial that it had violated the ADEA is hardly a basis for concluding that the Ninth Circuit either misread the record or stated a standard different from that which it actually applied. There is no provision in Rule 17 which allows for the predication of a petition for a writ of certiorari on a party's disagreement with the outcome of a circuit court of appeals' application of a correct standard to a record which more than justifies the conclusion reached.

There are two criteria for determining when error must result in a re-trial. The error must affect a substantial right of a party and it must be determined that there was prejudice to the party. An acceptance of Federated's position would result in an elimination of the criterion of prejudice from the standard enunciated by this Court in *McCandless v. United States, supra.* Federated, not the Ninth Circuit, has misapplied the *McCandless* test in arguing that once a case is submitted to a jury, as opposed to

being decided upon a directed verdict, all error affecting substantial rights must be deemed prejudicial.[4]

The only error about which Federated could complain is a demonstration that the jury was told it could find for the Plaintiffs if it found age to be one of several factors. No such misimpression could arise from the instruction given. The jury was told that age must have been a determining factor in both the employer's personnel policies and in the Plaintiffs' terminations and told that arbitrary, unfair action was an insufficient basis for an ADEA finding.

The fact that the jury was not misled into applying an incorrect standard of law, the overwhelming nature of the evidence and the fact that Defendant itself submitted the challenged instruction in the midst of several proposed charges which may well have appeared internally inconsistent all strongly support the Ninth Circuit determination in this case and speak loudly of the absence of any question appropriate for a writ of certiorari.[5]

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[4]Federated challenges the significance of the Ninth Circuit's observation that both *McCandless v. United States, supra* and *Fillippon v. Albion Vein Slate Company*, 250 U.S. 76, 82 (1919) involved situations where the jury was told a clearly incorrect statement of a controlling legal principle. The degree of the error and its possible impact upon the jury verdict are indeed factors to be considered in accordance with the particularized analysis announced in *Kotteakos v. United States of America, supra.* The difference between an incorrect and incomplete statement surely relates to the degree to which the error can be presumed to have affected the outcome.

[5]Federated argues that it did not waive its position regarding the instructional error. It is not necessary to reach the issue of waiver because it should be concluded, in any event, that Federated's actions introduced the erroneous instruction into the record. *See Mercer v. Paris Theriot*, 377 U.S. 152, 154 (1964) where the

Federated cites to the recent decision of this Court in *Pullman-Standard v. Swint*, ...U.S., 72 L.Ed.2d 66 (1982) in support of its theory that an appellate court should not second-guess a jury determination by refusing to order a new trial when there was some error below. *Pullman-Standard v. Swint, supra,* does not support Federated's contention. The Court there determined that the circuit court of appeals acted beyond its authority in *reversing* a factual determination of a district court without correctly applying the clearly erroneous standard set forth in Rule 52 of the Federal Rules of Civil Procedure. The result of *Pullman-Standard v. Swint* is to strengthen the authority of the trier of fact, a result which hardly supports overturning the jury verdict in this case.

B. A Writ of Certiorari Does Not Lie Under Rule 17 to Adjust "Semantic Differences" Among Courts of Appeals

Federated submits that this Court should act to approve a "uniform interpretation" of the ADEA standard of causation, an apparent attempt to bring its petition within the criterion of Rule 17 providing that the writ may be granted when a court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter (Rule 17(1)(a)). Federated urges that the appellate courts' utilizations of "a determining factor," "but-for" or "factor which made a difference" demonstrate "semantic" differences which should be resolved by this Court.

Court determined that an error could not be viewed as a deprivation of substantial justice when the complaining party had, *inter alia*, elicited the evidence which it contended should have been excluded during its examination of witnesses.

There have been two decisions faced by circuit courts of appeals in determining the ADEA motivational standard. Must age be the sole or only one factor in the adverse employment action? Both extremes have been rejected; the courts of appeals have found with repeated consistency that it is necessary for a plaintiff to show that age tipped the balance in the decision but not that it was the sole motivation. The courts have phrased that standard variously as "age must have made a difference," age was the "but-for factor" or age was "a determining factor." Try as it might, Federated cannot suggest any real differences in those terms and indeed several courts of appeals have recognized that all standards convey the same concept. It is a concept consistent with the Department of Labor regulations which state that the purpose of the Act is to ensure that age was not "a determining factor" in making any employment decision. 29 C.F.R. § 860.103(c).

The First Circuit in *Loeb v. Textron*, 600 F.2d 1003, 1019 (1979) referred to "the determining factor" as meaning that "but for" the unlawful motivation, the employee would not have been discharged. In *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1111-1112 (4th Cir. 1981) *cert. denied* ....U.S....., 102 S.Ct. 316 (1981), the court stated the test as being "a determining factor", a requirement derived from the *Loeb* "but for" test. The Ninth Circuit in *Kelly v. American Standard, Inc.*, 640 F.2d 974, 984-985, fn.17 (1981) referred to the "strong weight of authority" at the circuit court level supporting "some formulation" of the determining factor test. In *Geller v. Markham*, 635 F.2d 1027, 1035 (2d Cir. 1980) and *Bentley v. Stromberg-Carlson Corp.*, 638 F.2d 9 (2d Cir. 1981), the court noted that there was no significant difference between a determining factor and the standard of "made a difference." *See also Olsen v.*

Southern Pacific Transportation Co., 480 F.Supp. 773, 779, fn.4, (N.D. Calif. 1979) *aff'd* 654 F.2d 733 (9th Cir. 1981). There the court noted no significant difference between a standard which would require a plaintiff to prove that age was a determining factor and one which required the plaintiff to show that the decision would have been different but for age.

We do not believe that Rule 17 can be construed as providing a basis for a petition for certiorari to mandate that the Circuit Courts of Appeals use precisely the same words for a legal standard. The legal concept that age must be more than just another factor but need not be the sole factor has been solidly developed at the circuit court level; there is no basis for Supreme Court intervention under Rule 17.

C. There Is No Basis for Hypothesizing Jury Confusion of the State and Federal Claims

Federated asserts that the instructional error should be of particular concern because the jury could well have been confused about the state and federal claims. No ground exists for the assertion of such confusion. The jury was instructed about the distinct nature of each of the claims. It was told, in the court's use of Defendant's Instruction No. 21, that it could not find an ADEA violation based upon a conclusion that the terminations were "unreasonable, arbitrary or unfair."

With respect to the breach of contract claim, the jury was instructed, largely in accordance with charges submitted by Federated, that it must have found a contract consisting of "offer and an acceptance." It was also told that it could not predicate such a contract upon "uncertain or indefinite" terms nor could it find Federated to be in

breach of any term which was not developed by "mutual consent."

With respect to the duty of good faith and fair dealing claim, the jury was instructed that it had to find the existence of an employment contract, one created by offer and acceptance, before it determined that there was a covenant of good faith and fair dealing.[6] The claims were thus submitted to the jury under separate instructions with distinct elements; the finding of a contract of employment was in no way essential to the ADEA claim, nor was unfair dealing, an essential element of the covenant claim, a criterion submitted to the jury under the ADEA claim.

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[6]The jury was also told that it could not award punitive or pain and suffering damages under the ADEA; moreover, it was clearly instructed that it could not award duplicative damages. (R.T. Vol. 23, pp. 4066, 4075, 4080-4088.)

CONCLUSION

Federated has not articulated a ground under Rule 17 that would warrant the granting of its petition for certiorari. The reason for that lack of articulation is clear; there is no issue raised in this case falling within the parameters of Rule 17. There is no conflict in the Court of Appeals cases cited by Federated concerning the motivational standard applicable to an ADEA case. There is nothing about the Ninth Circuit's determination of harmless error which requires this Court's intervention under Rule 17.

Any decision that a circuit court of appeals could no longer review a trial record to determine whether an error was prejudicial would denigrate, not further, the federal judicial system by requiring needless re-trial of cases where the evidence was overwhelming. The Ninth Circuit's efforts to direct the trial of future ADEA actions while affording justice to the parties before it based upon the applicable standard of review are consistent with, rather than a departure from, the federal standard of justice.

Dated: August 6, 1982.

Respectfully submitted,

MAUREEN E. MCCLAIN
LITTLER, MENDELSON, FASTIFF & TICHY
Counsel of Record for Respondents

(Appendices follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

Nos. 81-4154– 81-4165

D.C. # 79-1591

Philip D. Cancellier, John W. Costello and Zelma Smith Ritter,
Plaintiffs-Appellants/
Cross-Appellees,

vs.

Federated Department Stores d/b/a I. Magnin
Defendant-Appellee/Cross-Appellant.

[Filed Mar. 30, 1982]

OPINION

Appeal from the United States District Court
for the Northern District of California

Robert P. Aguilar, District Judge, Presiding
Argued and Submitted December 16, 1981

Before: SNEED and PREGERSON, Circuit Judges, and EAST*, District Judge

SNEED, Circuit Judge:

The plaintiffs below and appellants here, Philip D. Cancellier, John W. Costello, and Zelma Smith Ritter are former employees of I. Magnin, the defendant below and

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

cross-appellant here. They won a jury verdict in the district court totalling $1.9 million, plus court-awarded attorneys' fees of $400,000, on their claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1976 & Supp. II 1978) and pendent state claims. They appeal denial of their motions for reinstatement and for an injunction against I. Magnin. I Magnin cross-appeals the judgment primarily on grounds of improper ADEA instructions, use of a general verdict, and an erroneous award of compensatory and punitive damages for breach of the implied covenant.[1] We affirm.

I.

FACTS

Plaintiffs-appellants are former executives of I. Magnin. Cancellier was vice president for stores and operations. Costello was divisional merchandise manager for accessories. Ritter was a buyer of sportswear. In early 1978 they were terminated after having been employed at I. Magnin for twenty-five, seventeen, and eighteen years, respectively. In July 1979 they brought this action in the United States District Court for the Northern District of California alleging that their terminations violated the ADEA. They sought back pay, liquidated damages, reinstatement to their former positions, and an injunction against further age discrimination at I. Magnin. Appel-

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[1] I. Magnin also includes numerous other grounds in its appeal including failure to instruct on constructive discharge, failure to properly instruct on the method of calculating ADEA and breach of contract damages, partisan conduct, incorrect evidentiary rulings, incorrect award of attorneys' fees, failure to grant I. Magnin's motions for new trial or remittitur, and failure to grant I. Magnin's pretrial motion for separate trials.

lants also raised claims under California law for breach of employment contract and breach of the implied covenant of good faith and fair dealing. Costello sought additional relief claiming fraud in connection with a promise of future employment at I. Magnin.

After a six-week trial the jury returned general verdicts in favor of Cancellier in the amount of $800,000, Costello in the amount of $600,000, and Ritter in the amount of $500,000. The jury also returned verdicts in favor of I. Magnin on Costello's fraud claims. Both sides appeal. For convenience, I. Magnin's cross-appeal is discussed first.

II.

I. MAGNIN'S CROSS-APPEAL

A. *ADEA "Determining Factor" Standard*

The ADEA makes it unlawful for an employer to discharge any individual because of such individual's age. 29 U.SC. § 623(a) (1976). In *Kelly v. American Standard, Inc.*, 640 F.2d 974, 984-85 (9th Cir. 1981), this court set out the requirements for a proper jury instruction on age discrimination. We adopted the "determining factor" test established in *Laugesen v. Anaconda*, 510 F.2d 307, 317 (6th Cir. 1975), and restated as a "but for" test in *Loeb v. Textron*, 600 F.2d 1003, 1019 (1st Cir. 1979). We rejected the argument that plaintiff must prove age was the sole factor in his discharge, and upheld a jury instruction stating that plaintiff has the burden of proving that one of the reasons he was terminated was because of his age, and that he should prevail if this factor "made a differ-

ence" in determining whether the plaintiff was retained or discharged.[2]

The essence of a proper jury instruction under *Kelly* is that it requires the jury to focus on the marginal effect of the age factor. Age need not be the sole factor in a discharge or other discriminatory practice. Conversely, it is not enough that age discrimination be present or even that it figure in the decision to fire; age must "make a difference" between termination and retention of the employee in the sense that, but for the presence of age discrimination, the employee would not have been discharged.

Here the district judge instructed the jury that "[a]ge must be a determining factor in an employer's personnel policies or practices before violation of the Act occurs." The district judge completely failed to give any guidance

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[2]The jury instruction summarized in *Kelly* is set out at greater length below.

INSTRUCTION NO. 9

The plaintiff has the burden of proving:

(1) that one of the reasons he was terminated was because of his age; and

(2) that as a result of the termination, he has suffered damage.

Title 29, Section 623(f), United States Code, provides that it shall not be unlawful for an employer to discharge any individual from his employment, or classify his employees in any way, for good cause or where the discharge or classification is based on reasonable factors other than age.

You are instructed that there may be more than one factor in defendant's decision to terminate the plaintiff's employment; but plaintiff is nevertheless entitled to recover if one such factor was his age and if, in fact, it made a defference in determining whether or not the plaintiff was retained or discharged. . . .

See Kelly v. American Standard, Inc., 640 F.2d 974, 984-85 (9th Cir. 1981).

as to the meaning of "determining factor" in lawsuits under the ADEA, or to refer to the *Laugesen* and *Loeb* test we adopted in *Kelly v. American Standard, Inc.* This was error. The words "determining factor" are not self-explanatory. In general, fair application of the Act requires the trial judge to formulate precisely what employer conduct the ADEA redresses and what employer conduct it leaves undisturbed. Because the attribute with which the statute is concerned comes to each of us in time, it will inevitably be present in a multitude of employee discharges. It will be a factor in many and a determining factor in some. It is only this last group that can obtain relief under the ADEA, even though, in the broad sense, it aims to benefit the entire aged employment force.

An erroneous ruling which relates to the substantial rights of a party is grounds for reversal unless it affirmatively appears from the whole record that it was not prejudicial. *McCandless v. United States,* 298 U.S. 342, 347-48 (1936). This is especially true of an error in jury instructions. *Fillippon v. Albion Vein Slate Co.,* 250 U.S. 76. 82 (1919). However, a careful reading of the transcript and record convinces us that in this case the instruction does not require reversal. Giving it was harmless error.

There is no indication in the proceedings that the outcome would have changed if the *Kelly* jury instruction had been given; to the contrary, it affirmatively appears from the record that the instruction did not prejudice defendant. This case was not decided by a hairsbreadth. There was ample evidence that consideration of age "made a difference" in the termination of Cancellier, Costello, and Ritter. *Cf. Van Domelen v. Westinghouse Electric Corp.,* 382 F.2d 385, 387 (9th Cir. 1967) (ample evidence of forbearance);

TSS Sportswear, Limited v. Swank Shop (Guam), Inc., 380 F.2d 512, 522, 523 (9th Cir. 1967) (overwhelming support in record for result below). Unlike the instructions given in cases requiring reversal, which affirmatively stated an erroneous version of the law, *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 420-21 (1926); *Fillippon, supra* at 83-84, or forbade the jury to consider what it properly should have considered, *McCandless, supra* at 345, the trial judge's instruction here was merely an unelaborated version of the correct standard. Significantly, the challenged instruction was fashioned by the judge from language submitted by I. Magnin.

While we are extremely reluctant to affirm verdicts based on jury instructions different from those approved in *Kelly* or their equivalent,[3] we find that on the facts of this case refusing a new trial is consistent with substantial justice. Fed. R. Civ. P. 61; *Ginsburg v. Ginsburg*, 276 F.2d 94, 96 n.2 (9th Cir. 1960); 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 61.11 & n.1a (2d ed. 1979). The instruction approved in *Kelly* adequately protects against mistaken inferences either that age must be the sole factor in the discharge, or that age may be less than a "but for" cause of the discharge. It is strongly preferred. Here, however, where the record convincingly rebuts any presumption of prejudice, we find the error harmless.

B. *Use of General Verdict*

I. Magnin contends that the district court committed reversible error by using simple general verdict forms without requiring special interrogatories or any breakdown of

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[3] *See* note 2 *supra*.

the verdict by source of damages.[4] Thus, I. Magnin contends, the possibility of punitive damages not recoverable under the ADEA in this lawsuit[5] or of duplicative damages in the pendent state claims requires a new trial.

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[4]The ADEA's proscription against age discrimination is enforced through express incorporation of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976), rather than through independent ADEA remedies. The ADEA provides at 29 U.S.C. § 626(b) that

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of section 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. . . .

Section 216(b) in turn makes employers liable for unpaid minimum wages or unpaid overtime compensation and "an additional equal amount as liquidated damages."

Thus, an employer who violates the ADEA is liable for back wages and benefits, as well as an additional equal amount as liquidated damages for willful violations. Kelly v. American Standard, Inc., 640 F.2d 974, 978 (9th Cir. 1981). The award of liquidated damages is in effect a substitute for punitive damages and is intended to deter intentional violations of the ADEA. *Id.* at 979; Dean v. American Security Insurance Co., 559 F.2d 1036, 1039-40 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); Douglas v. American Cyanamid Co., 472 F. Supp. 298, 303 (D. Conn. 1979).

[5]The Fourth and Fifth Circuit Courts of Appeal have denied recovery for punitive damages, *see* Walker v. Pettit Construction Co., 605 F.2d 128, 129-30 (4th Cir. 1979); Dean v. American Security Insurance Co., *supra*, although some federal district courts have held punitive damages are available, *see, e.g.*, Kennedy v. Mountain States Telephone & Telegraph Co., 449 F. Supp. 1008, 1009-11 (D. Colo. 1978). *See also* Kelly v. American Standard, Inc., 640 F.2d at 983 & n.14 (citing cases). The availability of punitive damages under the ADEA is not an issue in this case, since the judge instructed the jury that punitive damages were not available, Reporter's Transcript 4079, and the parties have not objected to that instruction.

Submission of special interrogatories is a matter committed to the discretion of the district judge. Fed. R. Civ. P. 49(b); *Monsma v. Central Mutual Insurance Co.*, 392 F.2d 49 (9th Cir. 1968); 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 49.04 & n.3 (2d ed. 1981). A jury generally is not required to itemize the components that enter into an award of damage. *Neal v. Saga Shipping Co.*, 407 F.2d 481, 489 (5th Cir.), *cert. denied*, 395 U.S. 986 (1969), *cited in Frito-Lay, Inc. v. Local 137, International Brotherhood of Teamsters*, 623 F.2d 1354, 1365 (9th Cir. 1980), *cert. denied*, 449 U.S. 1013 (1981), *and cert. denied*, 448 U.S. 1112 (1981) (district court sitting as trier of fact not required to itemize damage award).

When state claims for breach of the implied covenant of good faith and fair dealing are joined to claims of age discrimination under the ADEA, however, review of jury verdicts presents special difficulty to appellate courts. A general verdict may conceal punitive damages which may not be allowed under the ADEA. If the state claims are flawed, the entire verdict may have to be reversed. For these reasons, a separate verdict for each claim and a separate verdict on punitive damages is strongly preferred.

Nevertheless, failure to submit special interrogatories was not an abuse of discretion. *See supra* p. 5. The amounts awarded here are consistent with a reasonable award on the ADEA and pendent state claims. We find no reversible error. I. Magnin's claim that it is impossible to tell which plaintiffs prevailed on which of their claims is unpersuasive. The court submitted general verdict forms in favor of the defendant on each claim. The jury returned general verdict forms in favor of I. Magnin on Costello's fraud claim and Costello's negligent misrepresentation claim;

clearly, all other claims were resolved in favor of the plaintiffs. The verdict is clear as to which plaintiffs prevailed on which claims.

C. *Tort Damages for Breach of the Implied Covenant Breach of the Implied Covenant*

I. Magnin contends that a claim for breach of the implied covenant under the circumstances here is contrary to California law. The contention is without merit.

California law recognizes an implied covenant of good faith and fair dealing in certain contracts that neither party will do anything to deprive the other of the benefit of the contract. *See, e.g., Gruenberg v. Aetna Insurance Co.*, 9 Cal.3d 566, 578 (1973) (en banc); *Comunale v. Trades & General Insurance Co.*, 50 Cal.2d 654, 658 (1958). California courts have recently applied the duty created by the implied covenant to the situation where the employee alleges no more than long service and the existence of personnel policies or oral representations showing an implied promise by the employer not to act arbitrarily in dealing with its employees. Such claims sound in both contract and tort and may give rise to emotional distress damages and punitive damages. *Pugh v. See's Candies, Inc.*, 116 Cal.App.3d 311 (1981), *modified* in 117 Cal.App.3d 520(a) (1981); *Cleary v. American Air Lines*, 111 Cal.App. 3d 443 (1980) (alternative holding). *See Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 179 n.11 (1980) (dicta). *Cf.* Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 Stan. L. Rev. 153 (1981) (arguing against application of implied covenant to employment context).

Preemption

The ADEA does not preempt the award of tort damages on pendent state claims. *Kelly v. American Standard, Inc.*, 640 F.2d 974, 983 (9th Cir. 1981) (upholding emotional distress damages under state age discrimination statute). The award of tort damages on state claims here did not duplicate ADEA relief. Plaintiffs' ADEA claims were based on age discrimination in firing. Plaintiffs' contract and covenant claims were based on I. Magnin's obligation not to deal arbitrarily or unfairly in terminating plaintiffs' employment, an obligation created by I. Magnin's personnel policies and the fact of long service by the employee.[6] Punitive and emotional distress damages for this violation, unavailable under the ADEA,[7] do not duplicate the ADEA award for back pay, lost benefits, and liquidated damages. While the wisdom of allowing open-ended state claims for breach of the implied covenant to coexist with ADEA claims whose financial redress Congress has carefully limited to specific damage elements, *see* 29 U.S.C. § 626(b) (1976); *Kelly v. American Standard, Inc.*, 640 F.2d at 983 n.14, is arguable, it is for Congress, not us, to decide whether state common law remedies trench too closely on the federal scheme. Pendent jurisdiction, of course, is a doctrine of discretion. We recognize that in appropriate circumstances dismissal of the state claims without prejudice is proper. *United Mineworkers v. Gibbs*, 383 U.S. 715,

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[6] These claims do not depend on age. Thus, while the requirement of long service makes it more likely that successful plaintiffs will be advanced in years, claims by plaintiffs who are outside the ADEA-protected age range of from forty to seventy years are certainly possible—*e.g.*, a suit by a thirty-seven year old plaintiff with twenty years of service.

[7] *See* note 4 *supra*.

726-27 (1966). Such circumstances may exist, for example, where the trial judge finds that the state issues predominate in terms of the comprehensiveness of the remedy sought, or that there is a sufficient likelihood of jury confusion in treating divergent legal theories of relief to justify separating state and federal claims. *Id.*

Notice

I. Magnin contends that it did not have notice of plaintiffs' claims for *tort* (as opposed to *contract*) damages flowing from a breach of the implied covenant. Although the general verdict prevents us from determining with certainty the amount of punitive damages, they necessarily make up a significant portion of the award.[8] But the complaint alleging breach of the covenant implied in each plaintiff's employment contract was sufficient notice of plaintiffs' claim. No specific prayer for emotional distress or punitive damages is needed. A final judgment must grant the relief to which the prevailing party is entitled, "even if such party has not demanded such relief in his

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[8]The $1.9 million verdict exceeds the maximum allowable award for back pay and benefits under the ADEA consistent with the evidence by approximately $640,000. Thus, $640,000 is the minimum amount that could have been awarded as punitive (or pain and suffering) damages on pendent state claims.

Plaintiffs' expert witness presented evidence claiming back pay and benefits in the amount of $338,786 for Chancellier, $231,730 for Costello, and $197,097 for Ritter. Plaintiffs' Trial Exhibit 52. If, after deductions of $70,000, $22,500, and $47,500 for severance pay and interim earnings, Plaintiffs' Responding Brief 48-49, thet jury doubled these amounts in an award of liquidated damages, then punitive damages on pendent state claims must have been awarded in amounts of approxmately $260,000, $180,000, and $200,000, respectively. See *infra* p. 2; Plaintiffs' Responding Brief, *supra*. Actual punitive damages may have been higher. *See* Defendant's Opening Brief 45 n.38.

pleadings." Fed. R. Civ. P. 54(c). Moreover, plaintiffs' pretrial statement itemized the emotional distress and punitive damages sought. On these facts, I. Magnin's claim of inadequate notice is without merit.

Punitive damages

A jury may award punitive damages if it finds by a preponderance of the evidence that defendant was guilty of malice, oppression, or fraud. Cal. Civ. Code § 3294 (West 1981); *Egan v. Mutual of Omaha Insurance Co.*, 24 Cal.3d 809, 819 (1979). It is a question for the jury whether defendant's conduct was fraudulent, malicious, or oppressive. *Id.* at 821. The evidence before the jury adequately supported a finding against I. Magnin on the issue of punitive damages.

D. *Other Alleged Errors*

I. Magnin's additional claims of error are without merit.[9] A thorough review of the record below establishes that the trial was fairly and properly conducted.

III.

APPEAL OF CANCELLIER, COSTELLO, AND RITTER

A. *Reinstatement and Injunction*

The ADEA provides that "in any action brought to enforce [the Act] the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate . . . including without limitation judgments compelling employment, reinstatement or promotion . . . ." 29 U.S.C. § 626(b) (1976). Reinstatement is not a mandatory remedy; it lies

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[9] See note 1 *supra*.

within the discretion of the trial court after careful consideration of the particular facts of the case. *Combes v. Griffin Television, Inc.*, 421 F.Supp. 841, 846 (W.D. Okla. 1976). Ordinarily a verdict for plaintiff on the age discrimination claim is *res judicata* on plaintiff's equitable reinstatement claim. *Cleverly v. Western Electric Co.*, 450 F.Supp. 507, 511 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979). However, courts have refused to grant reinstatement where the employer continued a reduction in force for permissible business reasons, *id.*, or where discord and antagonism between the parties made it preferable to fashion relief from other available remedies, *Combes v. Griffin Television, Inc., supra*, at 846-47.

Damages in lieu of reinstatement may be awarded in addition to liquidated damages. However, the value of reinstatement is often speculative.[10] Thus, availability of a substantial liquidated damages award may be a proper consideration in denying additional damages in lieu of reinstatement. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1021-23 (1st Cir. 1979).

The trial judge in this case denied reinstatement because he found evidence of acrimony in the record and because he was "fully satisfied that [the verdict] has made the plaintiffs whole." Clerk's Record 124. The court noted the testimony of an I. Magnin officer who referred to plaintiff Ritter as a "cancer." I. Magnin's numerous attacks during the trial on plaintiffs' abilities support the trial judge's conclusion that plaintiffs and I. Magnin could no longer "co-exist in a business relationship that would be productive to the consumer, community or to the business itself." Clerk's

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[10]A possible exception would be cases involving the breach of employment contracts of specified duration.

Record 125. By virtue of his position in conducting the trial, the judge was peculiarly well-situated to observe the demeanor of plaintiffs and defendants in making this determination. Moreover, in view of the substantial verdict the judge did not abuse his discretion in finding that it had made the plaintiffs whole.

Like the reinstatement remedy, injunctive relief is available under the ADEA when appropriate. The trial judge found that the $2.3 million judgment against I. Magnin, including attorneys' fees, was sufficient to discourage I. Magnin from practicing age discrimination in the future. This finding was not an abuse of discretion.

B. *Attorneys' Fees on Appeal*

A grant of fees on appeal is within the discretion of the appellate court. *Kelly v. American Standard, Inc.*, 640 F.2d 974, 986 (9th Cir. 1981). Although plaintiffs did not prevail on their reinstatement and injunction claims, an award of fees on appeal in some amount is appropriate to reflect successful defense of the verdict below. *See id.; Cleverly v. Western Electric Co.*, 594 F.2d 638, 642 (8th Cir. 1979) (fees awards to plaintiff denied reinstatement). We remand to the district court for a determination of the proper amount.

IV.

CONCLUSION

While the instructions approved in *Kelly v. American Standard, Inc., supra,* and separate verdict forms for each claim, as well as separate verdict form for punitive damages, are preferred, the trial judge did not commit reversible error in instructing the jury on "determining factor"

under the ADEA, in using a general verdict, or in allowing tort damages on pendent state claims. Nor was denial of plaintiffs' motions for reinstatement and for injunctive relief against continuing age discrimination at I. Magnin an abuse of discretion. Plaintiffs are entitled to reasonable attorneys' fees in light of the outcome on appeal. The judgment of the district court is affirmed.

AFFIRMED.

Appendix B

DEFENDANT'S PROPOSED JURY INSTRUCTION No. 21

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

In 1967, Congress passed the Age in Discrimination in Employment Act. This Act provides that "It shall be unlawful for an employer . . . to discharge any individual . . . because of such individual's age."

DEFENDANT'S PROPOSED JURY INSTRUCTION No. 22

AGE AS DETERMINATIVE FACTOR

In order to prove that one was discharged because of his/her age in violation of the Age Discrimination in Employment Act of 1967, one must prove more than just age was one factor in the decision to terminate the employment relationship; it must be proven that age was the determining factor in the discharge.

In order to prove that age was the determining factor in the discharge, one must prove, by a preponderance of the evidence, that the termination would not have occurred "but for" the employer's motive to discriminate against the employee because of his/her age. In other words, if not for the employer's motive to discriminate because of the employee's age, the employee would not have been discharged.

DEFENDANT'S PROPOSED JURY INSTRUCTION No. 23

ADEA—FACTORS OTHER THAN AGE

The Age Discrimination in Employment Act of 1967 provides that an employer does not violate the Act when he takes any action towards an employee where such action is based on reasonable factors other than age.

The Act further provides than an employer may discharge an employee without violating the Act where such discharge is for good cause.

Under the Act, an employer may also discharge an employee without violating the Act where the discharge is based upon the employee's age and "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business."

DEFENDANT'S PROPOSED JURY INSTRUCTION No. 24

BUSINESS JUDGMENT NOT AN ISSUE

In determining whether an employer's actions are based on reasonable factors other than age or are for good cause, your focus must be on the employer's motivation and not on its business judgment. That is to say, that while an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the employer acted in good faith.

DEFENDANT'S PROPOSED JURY INSTRUCTION No. 24-A

YOUTH MARKET—TRUISM OR DETERMINATION TO TERMINATE

There has been testimony that both Federated and I. Magnin believed that they should have a larger share

of the "youth market", and that the hiring of younger personnel might be desirable. It is for you to decide whether these sentiments represented, on the one hand, mere truisms in that they were expressive of the opinion that the future potential of the enterprise depends upon the infusion of young men and women who were to be future leaders, or, on the other hand, whether those sentiments represented a determination to terminate older employees.

DEFENDANT'S PROPOSED JURY INSTRUCTION No. 24-B

SUBJECTIVE BUSINESS JUDGMENTS

Management prerogatives and subjective business judgments, which affect individual ability assessments, will often result in differential treatment of persons within the protected age group. These practices, however misguided they may be, are not violative of the Age Discrimination in Employment Act.

DEFENDANT'S PROPOSED JURY INSTRUCTION No. 25

PLAINTIFF CANCELLIER'S BURDEN OF PROOF

First, you must consider whether plaintiff Philip D. Cancellier has carried his burden of proof. He can do so in any of three different ways; I will now instruct you on those three different ways.

DEFENDANT'S PROPOSED JURY INSTRUCTION No. 25-A

DIRECT EVIDENCE

First, you must decide whether plaintiff Cancellier has proved, by a preponderance of the direct evidence, that he

was discharged because of his age and that but for his age, he would not have been discharged.

DEFENDANT'S PROPOSED JURY INSTRUCTION No. 25-B

PATTERN AND PRACTICE

Second, if you find that plaintiff Cancellier has proved, by a preponderance of the evidence, that age discrimination was a pattern and practice of I. Magnin, the there arises an inference that Mr. Cancellier was discharged for this reason.

A pattern or practice is present only where the denial of rights consists of something more than an isolated, sporadic incident; it must be the standard operating procedure. The mere fact that senior employees are often replaced by younger ones does not of itself establish a pattern and practice of age discrimination.

DEFENDANT'S PROPOSED JURY INSTRUCTION No. 25-C

PRIMA FACIE CASE

Third, you must decide whether plaintiff Cancellier has proved, by a preponderance of the evidence, all of the following four elements:

1. That he was between the age of 40 and 70 at the time of his alleged discharge;

2. That he was performing his job at a level that met I. Magnin's legitimate expectations at the time of his alleged discharge;

3. That he was actually discharged;

4. That after his alleged discharge, I. Magnin sought applicants of Mr. Cancellier's qualifications to do the same work as was done by Mr. Cancellier.

If you find that plaintiff Cancellier has proved all of these elements, by a preponderance of the evidence, then an inference arises that Mr. Cancellier was discharged because of his age.

DEFENDANT'S PROPOSED JURY INSTRUCTION
No. 26

CONSTRUCTIVE DISCHARGE

In order to find that plaintiff Cancellier was discharged, it is not necessary to find that he was terminated by I. Magnin. One is constructively discharged when an employer intentionally renders the employee's working conditions so intolerable that a reasonable person would feel compelled to resign. Discomfort, displeasure and inequities are not enouch to constitute constructive discharge; the working conditions must be intolerable to the average person and must have been intentionally made so by the employer.

DEFENDANT'S PROPOSED JURY INSTRUCTION
No. 27

FAILURE TO CARRY BURDEN OF PROOF

If you find that plaintiff Cancellier has failed to carry his burden of proof, you must give a verdict for defendant I. Magnin on plaintiff Cancellier's age discrimination claim.

DEFENDANT'S PROPOSED JURY INSTRUCTION
No. 28

DEFENSE TO DIRECT EVIDENCE

If you find that plaintiff Cancellier has met his burden of proof by producing direct evidence that he was dis-

charged and that his discharge was due to his age, the burden of proof then shifts to defendant I. Magnin to prove, by a preponderance of the evidence, either that plaintiff Cancellier voluntarily resigned from I. Magnin or that plaintiff Cancellier was discharged for good cause or for a legitimate business reason other than age.

DEFENDANT'S PROPOSED JURY INSTRUCTION No. 29

REBUTTAL OF INFERENCE—NO SHIFTING OF BURDEN OF PROOF

If you find that plaintiff Cancellier has met his initial burden of proof by raising an inference of age discrimination, by proving by a preponderance of the evidence, either all four elements of the third test I read to you before or that I. Magnin followed a pattern or practice of age discrimination, then it falls upon I. Magnin to state either a legitimate business reason or "good cause" for Mr. Cancellier's discharge, other than his age.

The burden of proof does not shift to I. Magnin; I. Magnin need not prove, the veracity of the stated business reason or "good cause".

The articulation of such a legitimate business reason or "good cause" for Mr. Cancellier's discharge is sufficient to dispel the inference raised by plaintiff Cancellier's proof.

DEFENDANT'S PROPOSED JURY INSTRUCTION No. 30

BUSINESS JUDGMENT—MANAGEMENT LEVEL JOB

An employer is entitled to make its own subjective business judgments, however misguided they may appear to

the jury. This is especially true when a management level job, such as was held by plaintiff Cancellier, is involved.

DEFENDANT'S PROPOSED JURY INSTRUCTION
No. 31

FAILURE TO REBUT INFERENCE

If you find that plaintiff Cancellier has met his burden of proof so as to raise an inference of age discrimination, you must return a verdict for plaintiff Cancellier on his age discrimination claim, but only if defendant I. Magnin has failed to state a business reason or other cause for the discharge of Mr. Cancellier.

By "cause", however, I mean only a cause that was as a matter of business judgment sufficient to I. Magnin; you may not substitute your judgment for that of I. Magnin.

DEFENDANT'S PROPOSED JURY INSTRUCTION
No. 32

STATED REASON AS PRETEXT

If you find that plaintiff Cancellier has met his burden of proof so as to raise an inference of age discrimination and you find that I. Magnin has stated a legitimate business reason or good cause for Mr. Cancellier's discharge, the inference is dispelled.

The burden of proof remains with plaintiff Cancellier at all times; therefore, once the inference is dispelled, plaintiff Cancellier has the burden of proving, by a preponderance of the evidence, that the stated legitimate business reason or good cause was in fact a pretext for discharging Mr. Cancellier because of his age.

DEFENDANT'S PROPOSED JURY INSTRUCTION No. 33

PRETEXT—DEFINITION

A "pretext" is an ostensible reason or motive assigned or assumed as a color or cover for the real reason or motive.

DEFENDANT'S PROPOSED JURY INSTRUCTION No. 34

FAILURE TO PROVE PRETEXT

If you find that: (1) plaintiff Cancellier has met his initial burden of proof so as to raise an inference of age discrimination; and (2) that I. Magnin has dispelled that inference; and (3) that plaintiff Cancellier has failed to prove, by a preponderance of the evidence that I. Magnin's stated legitimate business reason or good cause was a pretext for a prohibited discriminatory motive, then plaintiff Cancellier has failed to prove a violation of the Age Discrimination in Employment Act of 1967 and you must return a verdict for defendant I. Magnin on plaintiff Cancellier's age discrimination claim.

DEFENDANT'S PROPOSED JURY INSTRUCTION No. 35

PROOF OF PRETEXT

If you find that:

(1) Plaintiff Cancellier has met his burden of proof so as to raise an inference of age discrimination; and

(2) Defendant I. Magnin has dispelled that inference; and

(3) Plaintiff Cancellier has proved, by a preponderance of the evidence, that I. Magnin's stated legitimate business reason or good cause was in fact a pretext for discharging Mr. Cancellier because of his age; and

(4) That plaintiff Cancellier's age was the determining factor in his discharge; that is, he would not have been discharged but for his age,

then you may return a verdict for plaintiff Cancellier on his age discrimination claim.

DEFENDANT'S PROPOSED JURY INSTRUCTION No. 21, As Amended

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

In 1967, Congress passed the Age in Discrimination in Employment Act. This Act provides that "It shall be unlawful for an employer . . . to discharge any individual . . . because of such individual's age."

I want to make clear to you exactly what law we are dealing with here. The statute I have just summarized, which is the statute under which plaintiffs bring part of this action, forbids discrimination because of age. It does not, for purposes of this lawsuit, forbid any other type of discrimination, nor does it forbid any other action or inaction by defendant relative to plaintiffs other than discrimination on account of age. It is not unlawful for an employer to discharge an employee for good cause, or to take any action against any employee where the action is based on reasonable factors other than age. Age must be a determining factor in an employer's personnel policies or practices before a violation of the Act occurs.

Put another way, the basic principle is that an employer has the right to discharge an employee for good reason, bad reason or no reason at all absent discrimination. Thus, if you should find that age was not a determining factor in plaintiffs' terminations or failure to be reemployed, then you must render a verdict for the defendant on these issues even though you might feel their terminations were unreasonable.

Appendix C

PLAINTIFF'S INSTRUCTION No. 34
ORDER AND BURDEN OF PROOF
UNDER THE ADEA

In order to establish liability for violation of the ADEA, each plaintiff bears the burden of persuading the jury of his or her claim by a preponderance of the evidence.

In proving his or her claim, each plaintiff must first establish certain initial facts by a preponderance of the evidence.

These necessary initial facts are:

1. That the plaintiff was between the ages of forty and seventy years;

2. That an adverse employment action was taken against him or her;

3. That he or she was qualified for the postion held; and

4. That he or she either was replaced by a younger person or his or her functions were performed by a younger person, or produces evidence of discriminatory intent, or statistical evidence of discriminatory conduct, or evidence that he or she was treated more harshly than a similarly situated younger employee.

If you find that a plaintiff has failed to establish these initial facts, you should decide in favor of the defendant as to liability to that plaintiff.

However, if you find that the plaintiff has established by a preponderance of the evidence each of these necessary initial facts, then the defendant must offer sufficient

rebuttal evidence, which may be done by giving evidence to explain or articulate a reasonable, nondiscriminatory basis for the action taken against the plaintiff. If you find that the defendant fails to state a reasonable, nondiscriminatory reason for its actions against plaintiff, you should render a verdict against the defendant as to that plaintiff.

However, even if you find that the defendant has articulated a reasonable, nondiscriminatory basis for its actions against the plaintiff, you must render a verdict for the plaintiff if he or she establishes by a preponderance of the evidence that the defendant's reason is a pretext for age discrimination. When I use the word pretext, I mean that the defendant's action was not really based upon the reason stated.

On the other hand, if a plaintiff fails to establish by a preponderance of the evidence that the rebuttal reasons stated by the defendant were pretextual, then you should render a verdict in favor of the defendant and against the plaintiff.

* * * *

PLAINTIFFS' INSTRUCTION No. 35
DEMOTION AS VIOLATION OF ADEA

An employer may not demote an employee for reasons which violate the ADEA. Moreover, an employee need not accept such a demotion if offered.

* * * *

PLAINTIFFS' INSTRUCTION No. 36
ADEA—STANDARD OF CAUSATION

It is not necessary for a plaintiff to prove that age was the sole or exclusive reason for the defendant's decision to remove the plaintiff from his or her position. There

could be more than one factor in the decision to remove the plaintiff, but the plaintiff is entitled to recover if one factor was the plaintiff's age, and age made a difference in whether the plaintiff was discharged or adversely affected in his or her employment.

• • • •

Appendix D

In nineteen hundred and sixty-seven, Congress passed the Age in Discrimination in Employment Act. This act provides that, quote, among other things, "It shall be unlawful for an employer to discharge any individual because of such individual's age," end quote.

In order to establish liability for violation of the ADEA —that's Age Discrimination—Age in Discrimination in Employment Act is the correct title. I'll hereafter refer to it as the ADEA.

In order to establish liability for violation of the ADEA, each plaintiff bears the burden of persuading the jury of his or her claim by a preponderance of the evidence.

In proving his or her claim, each plaintiff must first establish certain initial facts by a preponderance of the evidence. These necessary initial facts are as follows:

One. That the plaintiff was between the ages of 40 and 70 years;

Two. That an adverse employment action was taken against him or her;

Three. That he or she was qualified for the position held; and

Four. That he or she either was replaced by a younger person, or his or her functions were performed by a younger person, or produces evidence of discriminatory intent or statistical evidence of discriminatory conduct.

If you find that a plaintiff has failed to establish these initial facts, you should decide in favor of the defendant as to liability to that plaintiff.

However, if you find that the plaintiff has established by a preponderance of the evidence each of these necessary initial facts, then the defendant must offer sufficient rebuttal evidence, which may be done by giving evidence to explain or articulate a reasonable non-discriminatory basis for the action taken against the plaintiff.

If you find that the defendant fails to state a reasonable non-discriminatory reason for its actions against plaintiff, you should render a verdict against the defendant as to that plaintiff.

If you find that the defendant has articulated a reasonable non-discriminatory basis for its actions against the plaintiff, you must render a verdict for the plaintiff if he or she establishes by a preponderance of the evidence that the defendant's reason is a pretext for age discrimination.

When I use the word "pretext," I mean that the defendant's action was not really based upon the reasons stated.

On the other hand, if a plaintiff fails to establish by a preponderance of the evidence that the rebuttal reasons stated by the defendant were pretextural, then you should render a verdict in favor of the defendant and against the plaintiff.

An employer may not demote an employee for reasons which violate the ADEA. Moreover, an employee need not accept such a demotion, if offered.

I want to make clear to you exactly what law we are dealing with here. The statute I have just summarized, which is the statute under which plaintiffs bring part of this action, forbids discrimination because of age. It does not, for purposes of this lawsuit, forbid any other type of

discrimination, nor does it forbid any other action or inaction by defendant relative to plaintiffs other than discrimination on account of age.

It is not unlawful for an employer to discharge an employee for good cause or to take any action against any employee where the action is based on reasonable factors other than age.

Age must be a determining factor in an employer's personnel policies or practices before a violation of the act occurs.

Put another way, the basic principle is that an employer has the right to discharge an employee, absent age discrimination.

Thus, if you should find that age was not a determining factor in plaintiffs' terminations, or failure to be re-employed, then you must render a verdict for the defendant on these issues, even though you might feel their terminations were unreasonable, arbitrary, or unfair.

• • • •

R.T. Vol. 23, pp. 4072-4075.

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No. 82-49

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERATED DEPARTMENT STORES, INC.
d/b/a I. MAGNIN,

Petitioner,

vs.

PHILIP D. CANCELLIER, JOHN W. COSTELLO and ZELMA SMITH RITTER,

Respondents.

Reply Brief of Petitioner

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Reply Brief of Petitioner

Respondents' Brief in Opposition[1] itself argues convincingly for the writ. In this short Reply, we explain why.

RESPONDENTS' MAIN CONTENTION IS AN ARGUMENT FOR CERTIORARI IN THIS CASE

Arraying at the outset (Br. Opp. 3-7) counsel's conception of the strongest evidence plaintiffs marshaled for the jury —and leaving unmentioned the array of conflicting evidence Magnin marshaled in support of its own case—respondent say that the harmless error holding of the Court of Appeals is one *"well within the realm of authority normally committed to the circuit court level"* because plaintiffs presented to the jury "extraordinary evidence of direct discrimination" (Br. Opp. 12). The further statement that (Br. Opp. 7-8) "Federated's position before this Court that evidence was 'sharply disputed' " is irrelevant because *"one assumes [such] will be true of any case that proceeds to trial,"* illustrates the threat to jury trials of age discrimination cases posed by the harmless error decision of the Ninth Circuit in this case. If counsel, understandably impelled by advocates' motives, so easily embrace appellate fact finding on liability as a substitute for the decision of a correctly

1. Brief in Opposition to Petition for Certiorari of Philip D. Cancellier et al., plaintiffs below, cited here as "Br. Opp. ___." Magnin's petition for certiorari is cited "Pet. ___."

We certify, pursuant to Rules 21.1(b) and 28.1, that the caption of the case in this Court contains the names of all parties, that petitioner Federated Department Stores, Inc., has one subsidiary within the meaning of Rule 28.1, *viz.*, The Children's Place, Inc., a Delaware corporation, and that petitioner has no parent or other subsidiaries or affiliates.

Italics in matter quoted here has been supplied.

instructed jury, other counsel in jury age discrimination cases can be expected to do so, and the published opinion of the Court of Appeals will lend credence to it.

Respondents compound misconception with the assertion (Br. Opp. 11) that there is no need for the Court to take a hand in trial of future cases because "the Ninth Circuit has already accomplished that end" by prescribing in Note 2 of its opinion an appropriate jury instruction on ADEA liability. Had the Court of Appeals corrected the error it found in this case by reversing the judgment, respondents would be right. But when the court coupled its emphatic identification of substantive error at trial with even more emphatic directions against repetition, and then dismissed the error as *harmless in this case* because the Judges of the court below weighed conflicting evidence and found it heavily in plaintiffs' favor, the Court of Appeals declared a new and dangerous doctrine of harmless error for jury age cases which should be set right by this Court. We stress here, as we did in our petition for rehearing below (Pet., App. C), that the issue of the harmless or prejudicial character of the error adjudicated by the Court of Appeals was never briefed or argued anywhere in the litigation before the Ninth Circuit opinion was handed down. Both sides assumed that the error for which we contended, and which the Court of Appeals found emphatically to exist, would be prejudicial because the error went directly to the vitals of petitioner's substantive ADEA liability to respondents.

RESPONDENTS' CASES ON HARMLESS ERROR DO NOT SUSTAIN THE PROPOSITION FOR WHICH RESPONDENTS URGE THEM

McCandless v. United States, 298 U.S. 342 (1936), *Kotteakos v. United States*, 328 U.S. 750 (1946), and *Fillipon v. Albion Vein Slate Co.*, 250 U.S. 76 (1919), long ago settled that substantive error in civil cases is *presumed prejudicial*

and requires reversal unless it *affirmatively* appears from the whole record that it was not prejudicial, i.e., harmless.[2] The Court of Appeals acknowledged that the error of the District Court in instructing the jury on liability in this case was substantive in its opinion on denial of rehearing (Pet., App. B) by amendment of the original opinion (App. A) to cite for the first time the decisions of the Court and the holding just summarized.[3]

The petition identifies (pp. 17-19) five categories of cases decided by the circuits in which error is held harmless.[4] To support their contention that the appellate finding of liability fact by the Court of Appeals here was "well within the realm of authority normally committed to the circuit court level" and made unremarkable by the disputed state of the trial record because conflicting evidence is commonplace in "any case that proceeds to trial" (Br. Opp. 12, 8), the brief in opposition cites but five cases. *Lynch v. The Travelers*

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2. The requirement for an "affirmative" showing of record to counter the presumption of prejudice was placed in italics by the Court in *McCandless*, 298 U.S. at 348.

3. We set out an illustration of the clashing evidence in conflict sent to the jury in this case, *infra*, p. 6.

4. A further category includes the cases where the complaining party waived the error. Waiver can be viewed either as converting what would otherwise be prejudicial error into harmless error or obliterating the error together for purposes of appellate review.

Understandably, respondents attempt to torture the statement of the Court of Appeals in this case that the instruction given on ADEA liability "was fashioned" from one submitted by Magnin into the hint of an illusion that petitioner should not complain because "Federated's action introduced the erroneous instruction into the record" (Br. Opp. 17). The fact is, as respondents implicitly concede, that both Magnin *and plaintiffs* proposed liability instructions which the trial judge rejected, and it is further conceded fact that Magnin's complaint that the instructions as a *whole* "completely failed to give any guidance" to the jury on liability was explicity and emphatically upheld in those words by the *Ninth Circuit itself* (App. A, p. A-4). Respondents' modest and not unexpected effort to transmute the facts into something more or different is not persuasive.

Indemnity Company, 452 F.2d 1065 (8th Cir. 1972); *Pherson v. Goodyear Tire & Rubber Co.*, 590 F.2d 756 (9th Cir. 1978); *Dairyland Insurance Co. v. Makover*, 654 F.2d 1120 (5th Cir. 1981); *Vanskike v. ACF Industries*, 665 F.2d 188 (8th Cir. 1981); and *Kend v. Chroma-Glo, Inc.*, 478 F.2d 198 (8th Cir. 1978). The inaptness of this thimbleful of authority to support respondents' sweeping, novel claim, and the ease with which the decisions are placed in traditional categories of minor, *procedural* harmless error, *is a further illustration of the threat to error-free trial of future age jury cases as a result of the interpretation which will surely be placed on the Ninth Circuit opinion in this case.* Here the trouble for cases still untried is not, as respondents say, to be found in the ADEA liability instruction now prescribed in Note 2 of the Ninth Circuit opinion *but in the larger and more potentially devastating risk that a new doctrine of harmless error unknown to other civil litigation has been declared for age and other employment discrimination cases in celebrated litigation by the published opinion of an experienced and respected tribunal.*

Lynch v. The Travelers Indemnity Company, supra, (Br. Opp. 14), holds that a jury instruction on the cause standard in an action to recover for windstorm damage as an insured loss was not an erroneous statement of governing state law, did not affect any substantial rights of the parties, and was at most a "very small" departure from preferred language. *Pherson v. Goodyear Tire & Rubber Co., supra* (Br. Opp. 15), holds that the instructions complained of by appellant did not misplace burden of proof when read in the light of other instructions. *Dairyland Insurance Co. v. Makover, supra* (Br. Opp. 15), decides only that the instructions taken as a whole stated "the substance of the law correctly." *Vanskike v. ACF Industries, supra* (Br. Opp. 14), affirmed a judgment against appellant's complaint about an instruc-

tion held argumentative but "not substantively incorrect." Finally, *Kend v. Chroma-Glo Inc., supra* (Br. Opp. 14), holds only that the instruction complained of correctly stated one of two approaches to an agency issue under state law in a diversity case.

The emphatic yet careful Ninth Circuit decision in this case makes plain beyond fair argument that the vice in the liability instruction given by the District Court was substantive, and substantive enough to upset judgments in future cases with reversal if the error is repeated. Such a situation is poles apart from the departures from procedural nicety and exact preferred language disclosed in but three of the five appellate decisions respondents' skilled counsel were able to find to support their "overwhelming evidence" claim. This reinforces three submissions: (1) the Ninth Circuit in this case substituted an appellate finding of fact on liability for a decision on conflicting evidence the jury in this case was denied a chance to make by the instructions the trial judge gave; (2) there is no law anywhere in the United States, *except in this case,* which permits this to be done; and (3) the appearance in this landmark age discrimination case of an alien, novel new doctrine of harmless error bodes trouble for the future akin to that seen in the early years of Title VII unless this Court is moved decisively to confirm that age discrimination cases remain in the mainstream of federal civil litigation.

We turn to a brief illustration of the conflicting nature of the evidence on which the Ninth Circuit made the ultimate liability finding.

ILLUSTRATIVE CONFLICTS IN THE EVIDENCE

As we have seen, respondents' statement of the case (Br. Opp. 3-7) arrays at the outset counsels' summary of plaintiffs' strongest evidence plucked here and there from a trial

record of more than 4,000 transcript pages. To emphasize in concrete terms what counsel acknowledge—and then wave aside as the stuff of the usual case which reaches trial on the merits—we set out below in the left column some of plaintiffs' summary examples from the record and in the right column the countervailing, conflicting evidence offered by Magnin. Through by no means comprehensive, this material illustrates the clashing lines of evidence between which the jury in this case was required to choose in arriving at a verdict under a liability instruction which, in the words of the Court of Appeals, "completely failed to give [the jury] any guidance as to the meaning" of governing federal law (Pet., App. A, p. A-4).

Plaintiffs' Evidence	Magnin's Evidence
1969 study (Pl.Ex. 46) referred to San Francisco salespeople as "terribly old."	The reference to old salespeople was to employees past mandatory retirement age when the memorandum was written and referred to replacement, not termination, of employees (Steiner, R.Tr. 2411-12).
1970-75 report stated that employee, age 59, "has, of course, reached her potential."	The document (Pl.Ex. 1) came to the attention of the executive group which made the decisions complained of by plaintiffs for the first time when their depositions in the case were taken (Hughes, R.Tr. 3784).
Form entitled "Personnel Specification Sheet" contained a blank at end for "desirable age."	Used in executive search for one employee to replace *both* Cancellier and another V.P., the "desirable age" blank was filled in with the word "open" and policy was always to leave it blank or enter "open"; no "desirable age" standard existed (Tonner, R.Tr. 2419-21).

Plaintiffs' Evidence	Magnin's Evidence
1977 organizational chart labeled "highly confidential" listing key executives, their ages and possible replacements.	Chart was confidential because, unlike charts distributed widely, this one set out top executive salaries (Hughes R.Tr. 75-76), ages were entered to identify employees nearing mandatory retirement (*ibid.*), and to identify people who might replace the individual at retirement (*id.* at 67).
Lydia Dresnek was told in 1973 by her supervisor, Mosson, of a plan to get rid of "old biddies."	Mosson denied any such statement flatly and under oath (R.Tr. 2624).
Costello testified his immediate supervisor referred to buyer in early 50's as "menopausal" and who bought handbags "which looked as old as she did" in support of Costello's claim of termination of age.	As DMM for accessories, Costello was "not doing the job in terms of market relationships, in terms of merchandising effort ability, in terms of his ability to interact with people and make things happen" (Fox, R.Tr. 3483); "Mr. Costello was not functioning effectively with the market" or with the buyers (R.Tr. 3485) and suppliers complained of Costello's "erratic kinds of behavior, yelling and screaming, pushing the panic button" (R.Tr. 3793); another DMM was terminated at the same time as Costello at age 38 (Fox, R.Tr. 3528, Def.Ex. J.C.11); and an offer was made to a candidate to replace Costello at an annual salary of $57,000 who was then age 48 (Fox, R.Tr. 3500, Def.Ex. J.C.12).

So much for any notion that the record contained no conflict on the best points respondents could marshal. A more detailed summary of the respects in which the facts were fiercely disputed is in the excerpts from the briefs below, with detailed record citations, in Appendix E to the Petition.

On this respondents say with revealing clarity (Br. Opp. 13) that "the Court of Appeals *found* • • • that the outcome of the trial would not be different even if the jury had been instructed in the manner" emphatically required by the opinion of the Ninth Circuit for all future cases—but not this one.[5]

FURTHER GROUNDS FOR THE WRIT: RESPONDENTS' DENIGRATION OF "SEMANTIC DIFFERENCES" IN FEDERAL LIABILITY STANDARDS IN AGE CASES AND THE RISK OF CONFUSION BETWEEN FEDERAL AND STATE CLAIMS

The description of difficulties already apparent among the circuits in jury instructions on ADEA liability as "semantic" is our own, of course (Pet., p. 23). Respondents

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5. Counsel rightly relegate to a footnote (Br. Opp. 17, n.4) the hint in the opinion of the court below, as it was amended on denial of rehearing, that the erroneous jury instruction here "was merely an unelaborated version of the correct standard" (Pet., App. B, p. B-2). The sharp criticism of the erroneous instruction retained in the amended opinion of the Ninth Circuit, however, leaves no doubt that in a future case a judgment founded on the verdict of a jury so unguided on the governing ADEA standard as the jury here will be reversed by the Ninth Circuit. For *other* errors and substantive departures in federal age cases, that language, if not disregarded in light of the Ninth Circuit's pointed discussion of the complexities encountered in seeking for discrimination based on age, poses a further risk that future substantive error will be brushed aside because a standard was "correct but unelaborated," yet in a manner which, in the words of the court below, "completely failed to give any guidance as to the meaning of" governing law.

say that since we are unable to point to a diametrical conflict among the circuits on ADEA liability within Rule 17, the existing situation amounts to no more than language quibbles undeserving of attention at this time. They also assert that we err in "hypothesizing" confusion between ADEA and state claims in age cases. But this ignores three basic facts: (1) the differences between approved ADEA liability standards in decisions throughout the United States go to the *substance* of rights guaranteed by a *single* federal statute to a predominant group of citizens in a field of federal litigation certain to involve a flood of cases soon, and it is unthinkable to risk anything but a uniform standard of jury decision of like cases throughout the United States, (2) the Court here has an opportunity to avoid the confusion and uncertainty attending early Title VII cases in which delay of authoritative pronouncement convinced litigants, some think, that employers were being held liable upon standards *which did not exist* at the time of the acts complained of, and (3) in the vast majority of age discrimination jury cases state claims will be welded to and tried with the federal ADEA claim on which jurisdiction depends—and jury confusion of variant standards of liability for state claims with a shifting, amorphous, even *ad hoc* articulation of the federal standard inevitably will result in reversal of judgments which might otherwise be affirmed, *and in this case the Court of Appeals explicitly warned that this would be so.*

Experience suggests it would be unwise in this sensitive area for the Court to withhold the power to clarify it alone possesses until a diametrical conflict among the circuits on ADEA liability which is almost certain to develop becomes fact. Lawyers undertaking to representing the interests of complainant employees between ages 40 and 70 have no

alternative but to bring cases in which federal jurisdiction is founded on ADEA but joined with state law claims for the same grievance and which turn on liability principles different from the federal standard. On this the Ninth Circuit in this case said (Pet., App. A, p. A-8, A-9, A-6) that "ADEA does not preempt the award of tort damages on pendent state claims," even though "in appropriate circumstances dismissal of the state claims without prejudice is proper," and yet warned (Pet., App. A, p. A-7):[6]

> "When state claims * * * are joined to claims of age discrimination under the ADEA, however, review of jury verdicts *presents special difficulties to appellate courts.* A general verdict may conceal punitive damages which may not be allowed under the ADEA. *If the state claims are flawed, the entire verdict may have to be reversed.*"

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert S. Daggett
Attorney for Petitioner

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6. Albeit with specific reference to the need for a separate verdict for each claim and a separate verdict on punitive damages in cases like this, but in language of broader and deeper import for cases combining state and ADEA employee claims than the procedure on verdict forms specifically addressed, as we now show in the text following. The significance is that the "special difficulty to appellate courts" we discuss here is a warning cast not by counsel but by the *Ninth Circuit itself in this case.*